No. 77-681

In the

Supreme Court of the United States

October Term, 1977

TAX ANALYSTS AND ADVOCATES,
THOMAS F. FIELD,
Petitioners,

v.

W. MICHAEL BLUMENTHAL, Secretary
of the Treasury of the United States, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the decision in this case of the United States Court of Appeals for the District of Columbia Circuit, rendered on June 15, 1977.

CITATIONS TO OPINIONS BELOW

The decision of the District Court is reported at 390 F. Supp. 927 (D.D.C. 1975). The majority decision of

the Court of Appeals is as yet unreported and is printed as Appendix A, hereto. The common dissent in the instant case and in *American Society of Travel Agents, Inc. v. Blumenthal* is also unreported and is reprinted as Appendix B, together with the majority opinion in the *Travel Agents* case.

JURISDICTION

The judgment of the District Court was filed on February 5, 1975. The majority opinion of the Court of Appeals was filed on June 15, 1977. Thereafter, on June 27, 1977, the petitioners filed a motion asking for an extention of time for filing a motion for rehearing until 14 days after the dissenting judge filed his separate views, but this motion was denied. Petitioners then asked this Court for an extension of time for filing a petition for a writ of certiorari, and, by order dated August 22, 1977, the period for filing this petition was extended to and including November 12, 1977. The opinion of the dissenting judge in the Court of Appeals was filed September 15, 1977.

The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. When determining whether a plaintiff has standing to sue, has this Court allowed the zone of interest test to "become extinct"?

2. If not, was the zone of interest test properly applied by the Court of Appeals to bar a suit by a domestic oil producer who suffers actual competitive injury as

a result of erroneous and illegal Internal Revenue Service rulings which benefit the foreign operations of his competitors?

STATUTES INVOLVED

The statutes involved are 5 U.S.C. Sec. 702, and 26 U.S.C. Secs. 901 and 7805.

STATEMENT OF THE CASE

Petitioner Tax Analysts and Advocates (TAA) is a nonprofit corporation organized under the laws of the District of Columbia in 1970 for the purpose of promoting tax reform. It represents over 175 individual supporters, each of whom is a United States taxpayer who has contributed financially to TAA to ensure that the Internal Revenue Service (IRS) does not grant special interest groups unduly favorable tax treatment beyond that which the IRS may lawfully provide.

Petitioner Thomas F. Field is the owner of the entire working interest in a small, currently producing oil well located in Venango County, Pennsylvania. The well is not subject to price controls, and the price received for its output is therefore determined by "the price of the approximately 15 percent of energy imported [into the U.S.] as oil. . ."[1]

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[1] The quoted language is from the 1975 *Economic Report of the President*, transmitted to Congress in February 1975. That report states, at pages 74-5, that "The structure of the U.S. energy market is such that the price of the approximately 15 percent of energy imported as oil sets the unconstrained domestic energy price as well."

Section 7805 of the Internal Revenue Code empowers the Secretary of the Treasury to promulgate rules and regulations for the enforcement "of this title". Section 901 of the Code is among those with respect to which both rules and regulations have been published. That section allows qualifying United States taxpayers to claim a foreign tax credit for "the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States."

Under Section 901(b), a credit against federal income taxes can be taken only for foreign *income* taxes paid; no credit is allowed for foreign sales taxes, excise taxes, or severance taxes. Nor may a credit be claimed for royalties paid to a foreign government. These non-income taxes and royalties are treated as ordinary business expenses; they therefore result in a *deduction* from gross income rather than in tax credits which can offset U.S. tax on a dollar-for-dollar basis.

Beginning in the 1950's, the principal oil producing nations in the Middle East, North Africa, and South America promulgated a series of formal income tax statutes which appeared to impose net income taxes on United States companies producing oil in those nations. In 1955 and 1968, the Internal Revenue Service published rulings that the "income taxes" paid on oil production to Saudi Arabia and Libya, respectively, were creditable taxes. Rev. Rul. 55-296, 1955-1 Cum. Bull. 386; Rev. Rul. 68-552, 1968-2 Cum. Bull. 306. In addition, the Internal Revenue Service has issued a substantial number of unpublished rulings to United States oil companies, holding that payments of "income taxes" made to the other principal OPEC nations are also creditable taxes under Section 901.

In recent years, the nature of the purported "income taxes" imposed on oil production by the principal oil exporting nations has changed both in character and amount. Since at least 1973, if not earlier, the purported "income taxes" imposed by the OPEC governments have been calculated so as to produce a fixed per barrel "government take" without regard to the profits or losses of the producing firms.[2] Because these imposts are calculated on a fixed per barrel basis, and because they have no relationship to the actual gross or net income of the oil companies paying them, it seems quite obvious that they no longer constitute creditable income taxes – if they ever did.

The Treasury Department is aware of these facts. For example, in his November 18, 1975 speech to the National Foreign Trade Council, Charles M. Walker, who was then the Assistant Secretary of the Treasury for Tax Policy, stated that ". . . the tax systems of the OPEC countries impose very high taxes which have many of the characteristics of royalties." And a prominent, recent scholarly study makes the same point:

> There is every reason to assert that the bulk of the oil company payments to host countries are in fact royalties and that this is relevant to the eligibility of these payments for full foreign tax credit.
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> * * *

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[2] The computation of the OPEC "government take" involves multiplication of the number of barrels produced in a given period by a constant figure which is a percentage of a fictional reference price selected by the respective foreign governments to provide the desired per barrel government revenue, reduced by a fixed per barrel amount (continued)

On the grounds of tax theory, therefore, the extension of the foreign tax credit to the OPEC charge is highly questionable.[3]

In light of these facts, petitioner Tax Analysts and Advocates on February 19, 1974 filed a detailed administrative petition with the Commissioner of Internal Revenue explaining the impact of the conversion of OPEC taxes into a fixed per barrel "government take" and pointing out the illegality under those circumstances of the Internal Revenue Service rulings permitting the "income taxes" in question to be credited against U.S. tax liabilities. The petition also called on the Commissioner to exercise the discretion granted by Section 7805 to revoke the rulings in question. The Commissioner did not respond.

Petitioners Tax Analysts and Advocates and Field then filed a complaint on June 17, 1974, seeking a declaratory judgment that the challenged Internal Revenue Service rulings were unlawful, and asking for an injunction requiring the Internal Revenue Service to withdraw them. This complaint was subsequently amended on August 13, 1974. Both the original and the amended complaint pointed out

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2 (continued)
denominated as a "royalty" and small per barrel operating costs. For further information on the computation, see *Petroleum Intelligence Weekly*, January 14, 1974, at page 6. For further information on the changes made by OPEC in the method of computing the "government take", see the *Middle East Economic Survey*, December 28, 1973, p. 3a and December 13, 1974 (supplement).

3 Gerard M. Brannon, *Energy Taxes and Subsidies: A Report to the Energy Policy Project of the Ford Foundation* (1974) pages 94-96.

that the revenue loss to the United States Treasury, if the challenged rulings were not revoked, would be approximately $3 billion in 1974.

In addition to this revenue loss to the Treasury, petitioner Field sought relief in the amended complaint from two injurious effects of the challenged IRS rulings which he suffered in his capacity as a domestic oil producer. He pointed out, first, that the price for foreign oil charged by the oil producers who have received the challenged rulings determines the market price for oil in the United States (see footnote 1, *supra*) and that these prices are lower because of the tax advantages conferred by the rulings. Therefore, the rulings result in his obtaining lower prices for his oil production.

Field also alleged that the Internal Revenue Service rulings increase the net income from foreign oil production over what it would be if payments to foreign governments could only be deducted from gross income, as is the case domestically. This results in higher investment returns from foreign oil production than from domestic production, and lessens the price that Field could receive if he were to offer his working interest for sale.

Petitioner Field also alleged that he would be required to pay higher federal income taxes because the Internal Revenue Service rulings improperly reduce the tax burden of American companies producing oil abroad. Petitioner Tax Analysts and Advocates alleged that its supporters, as federal taxpayers, would likewise be required to pay higher federal income taxes.

On February 5, 1975, the District Court issued an opinion and order dismissing the complaint solely on the ground

that petitioners lacked standing. 390 F. Supp. 927 (D.D.C.) Thereafter, both petitioners appealed.

The Court of Appeals, with one judge dissenting, concluded that both petitioners, as taxpayers, lacked standing "because they have suffered no judicially cognizable injury in this capacity. . . " In addition, while acknowledging "that appellant Field has suffered injury in fact" in his capacity as a domestic oil producer, it also held that he failed to satisfy the "zone test" which was announced by this Court in 1970.[4] The existence (or lack of existence) of the zone test, and its possible contours, are therefore the focus of this petition.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS DECISION CONFLICTS WITH THE TEACHING OF THIS COURT IN ALL OF ITS RECENT MAJORITY OPINIONS ABOUT STANDING.

Since 1970, when it announced the "zone test" in *Association of Data Processing Organization v. Camp*, 397 U.S. 150, this Court has decided twenty major standing cases, almost all of them by a divided Court. With respect to the so-called "zone test," the teaching of the eighteen most recent of these decisions seems to be unequivocal: the zone test is dead.

The suggestion that the zone test for standing has been allowed to die a natural death has been strongly advanced

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[4] The zone test was developed and applied in two companion cases: *Association of Data Processing Organizations v. Camp*, 397 U.S. 150, and *Barlow v. Collins*, 397 U.S. 159.

by Professor Kenneth Culp Davis, probably the leading American writer on the subject of administrative law. In the introduction to the July 1977 Cumulative Supplement to his *Administrative Law of the Seventies* he states (p. 6) that:

> The "zone" test enunciated in 1970 was unsatisfactory, but it has apparently died from neglect; the Supreme Court has not asserted it since 1970 although it has been relevant to many cases.

Similarly, in the text of his July 1977 Supplement, Professor Davis states (at p. 181) that:

> The [Supreme] Court deserves commendation for its benign neglect of the "zone" test it enunciated in 1970 in the *Data Processing* opinion. Since the Court has not mentioned that test in its latest eighteen majority opinions about standing, and since it was relevant to a good many of the cases . . . it has become extinct, as it should.

Thus, if the teaching of the leading American scholar on the subject of standing is accepted, the Court below has erred by reviving an "unsatisfactory" test of standing, which this Court has allowed to "become extinct." Not only does this deny justice to the petitioners, but it improperly prevents adjudication of a case which presents questions of considerable public importance.

On the other hand, if Professor Davis is wrong in his interpretation of this Court's eighteen most recent standing decisions, it is highly important to make that point clear, for the guidance of the lower courts and practitioners. Otherwise, the unfortunate ambiguity that now surrounds the zone test will continue to create mischief.

II

THE COURT OF APPEALS DECISION CONFLICTS WITH THOSE OF OTHER APPELLATE COURTS.

A. As to whether the zone of interest test is dead:

As the majority opinion of the Court of Appeals in this case has pointed out, "at least one circuit court has chosen forthrightly to state its opposition to the [zone of interest] test." The case to which the majority refers is *Park View Heights Corporation v. City of Black Jack*, 467 F.2d 1208 (C.A. 8, 1972). That case reversed a District Court's holding that two nonprofit corporations and eight individual plaintiffs lacked standing to challenge a municipal zoning ordinance. At the beginning of its discussion of the standing issue (p. 1212, n. 4) the Eighth Circuit stated:

> At this beginning point of our "standing" discussion, we record our preference for simplifying the "law on standing." We think that all that is required for a plaintiff to have standing to sue for a constitutional or a statutory violation is a showing of "injury in fact".

Accordingly, if petitioner Field, or another similarly situated individual, were to bring the present suit in the Eighth Circuit, he would have standing. An important right, such as access to the courts for the redress of injuries, should not depend to such an extent on the geographical location in which suit is brought. Review by this court is needed to establish greater geographical uniformity with respect to the zone test, assuming that test still exists.

B. As to whether maintenance of competitive fairness is one of the interests protected by the Internal Revenue Code.

The result of the Court of Appeals decision in this case is to leave business competitors without effective judicial protection when the Commissioner of Internal Revenue abuses the discretion granted him under Section 7805 of the Internal Revenue Code, through the issuance of rulings that favor one competitor at the expense of another. The Appeals Court is quite frank about this: "The existence of competitive ramifications flowing from the challenged agency action," it states at page 26 of the slip opinion, "is not sufficient evidence to infer that Congress arguably intended to protect or regulate competitive interests."

This aspect of the Court of Appeals opinion is sharply in conflict with the landmark decision of the Court of Claims in *International Business Machines Corp. v. United States*, 343 F.2d 914 (1965), *cert. denied*, 382 U.S. 1028 (1966). That case, like this one, involved a situation in which the Internal Revenue Service had favored one competitor over another by the issuance of a ruling that was erroneous and illegal. The International Business Machines Corporation argued that the Internal Revenue Code did not permit discrimination of this sort.

In the course of accepting IBM's arguments, the Court of Claims pointed out (at p. 920) that abuse of the discretion granted to the Commissioner of Internal Revenue with respect to rulings is reviewable "in the same way as other discretionary administrative determinations." It also stated that Section 7805(b) of the Internal Revenue Code embodied the Congressional intent that the Court of Appeals in the present case was unable to discern:

> Congress can direct the Service and the courts to take account, in a specified area, of discrimination, of equality of treatment, and of the tax burdens imposed on competitors or persons in the same or a comparable situation. Where that is what Congress has declared, the policy of the tax law emphasizes, in that particular sector more than in the rest of the tax field, the component of equal treatment; courts are then bound to vindicate that special interest just as they are, generally, to see that the uniform taxes Congress has sought to levy are paid . . . With respect to Internal Revenue Service rulings and regulations, the Congressional mandate does direct administrative and judicial attention to this factor of equality (among others). *International Business Machines Corp., supra,* at 919

The fact that the present case involves competitive discrimination arising from IRS rulings issued under Section 901 of the Internal Revenue Code, whereas the *IBM* case involved rulings issued under Section 4191, is not a point of distinction, because the discretion granted under Section 7805 of the Code extends to all rulings and regulations "for the enforcement of this title." As a consequence, were the *IBM* case to arise today, it seems probable that, in addition to the other standing objections raised in the 1965 case by the government, the firm would also be faced with the claim that the Internal Revenue Service has what the dissenting judge in the present case calls "virtually unfettered discretion in adjusting . . . economic relationships." (See dissent, p. 2, n. 2)

III

THE COURT OF APPEALS DECISION HAS IMPORTANT IMPLICATIONS BOTH WITHIN AND BEYOND THE TAX AREA.

A. The decision will further aggravate the chaotic situation faced by the lower courts when they seek to determine the status of the zone test.

Currently, both judges and litigants face a chaotic situation when seeking to determine the justiciability of a claim in light of the zone of interest test. The existing confusion should be ended. The majority opinion in the Court of Appeals in the present case contains (slip opinion, p. 13) a plea for greater clarity in this area:

> . . . [The Supreme] Court has not attempted a detailed explanation of the purpose, meaning, or scope of the [zone test] standard. The deficiencies, ambiguities, and unresolved questions inherent in the zone test have been the subject of voluminous criticism. There has also been confusion in the application of this prudential standard in the courts. Some courts have chosen to ignore the zone test; at least one circuit court has chosen forthrightly to state its opposition to the test. Perhaps the most common pattern is to announce in conclusory terms that the zone standard has or has not been satisfied. (Footnotes omitted.)

A judicial standard which is so thoroughly riven with ambiguity and imprecision is a fertile source of both wasted judicial effort and inequality in the treatment of similarly situated parties. Accordingly, the zone of interest test cries out for clarification – or for decent burial.

B. The decision of the Court of Appeals will produce unfettered and unreviewable administrative discretion with respect to IRS rulings that lose revenue.

Internal Revenue Service rulings are regularly reviewed by the courts, but the rulings which are commonly subjected to judicial scrutiny are those that have *increased* an individual's or a firm's tax payments. The peculiarity of this case, like the *IBM* case, *supra*, is that it involves so-called "giveaway rulings." These are IRS administrative determinations that *lose* rather than raise revenue.

Revenue-losing IRS rulings have had – and continue to have – an important impact on our tax system. Whether they can be subjected to judicial scrutiny will be determined to a considerable degree by the outcome of this case. Unless such rulings can be subjected to judicial review in an orderly manner, we will be faced with what the dissenting judge in the Court of Appeals calls (dissent, p. 2, n. 2) "The spectre of . . . unreviewable discretion [which can be] exercised in contradiction to the commands of Congress . . ."

Provided that injury in fact is demonstrated, both revenue-losing and revenue-raising IRS rulings should be subjected to judicial review in the same fashion. To the extent that the zone of interest test is a barrier to that legitimate goal, it should be interred or appropriately modified. The Commissioner of Internal Revenue should not be empowered to commit wrongs for which there is no judicial remedy.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS F. FIELD
Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Thomas F. Field, attorney for the petitioners and a member of the bar of the United States Supreme Court, do hereby certify that on this 11th day of November 1977, I served copies of the foregoing petition for writ of certiorari on the attorneys of record for the respondents herein, Scott P. Crampton, Earl J. Silbert, Richard Farber, and Leonard J. Henzke, Jr. and on the Solicitor General of the United States, Wade H. McCree, Jr., by mailing three copies of the same, postage prepaid, to each of them at their offices at the Department of Justice, Washington, D.C. 20530, and (in the case of Silbert) at the U.S. Courthouse, Washington, D.C. 20001.

Thomas F. Field
Attorney for Petitioners

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1304

TAX ANALYSTS AND ADVOCATES,
THOMAS F. FIELD, APPELLANTS

v.

MICHAEL BLUMENTHAL, Secretary of
Treasury of the United States, et al.

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil 74-917)

Argued 8 January 1976

Decided 15 June 1977

Joseph Onek, with whom *Eldon V. C. Greenberg* and *Richard A. Frank* were on the brief, for appellants.

Leonard J. Henzke, Jr., Attorney, Tax Division Department of Justice, with whom *Scott P. Crampton*, Assistant Attorney General, *Earl J. Silbert*, United States

Attorney, and *Richard Farber*, Attorney, Tax Division Department of Justice, were on the brief, for appellees.

Before: BAZELON, *Chief Judge*, TAMM and WILKEY,* *Circuit Judges*

Opinion for the Court filed by *Circuit Judge* WILKEY.

Chief Judge Bazelon dissents and will file a statement of separate views at a later date.

WILKEY, *Circuit Judge*: The appellants in this case are Tax Analysts and Advocates (TAA), a non-profit corporation organized under the laws of the District of Columbia for the purpose of promoting tax reform, and Thomas F. Field, Executive Director of TAA. Appellants filed suit in the District Court[1] seeking a declaratory judgment that certain published and private rulings of the Internal Revenue Service (IRS) allowing tax credits for payments made to foreign nations in connection with oil extraction and production are contrary to the Internal Revenue Code (Code) and therefore unlawful.[2] In addition, appellants sought an injunction requiring the IRS to withdraw the rulings and to collect taxes from oil companies for all periods not barred by the statute of limitations in those cases where foreign tax credits were taken pursuant to the ruling.[3] Both appellants claim to have standing to sue as federal taxpayers; TAA makes this claim as the representative of its members, who are federal taxpayers,[4] while appellant Field relies on his status as an individual taxpayer.[5] In addition, appellant Field contends that he had standing as a competitor in his capacity as the owner of the entire working interest in a currently producing domestic oil well.[6]

On a motion by the defendants,[7] the District Court (Hart, J.) dismissed thé complaint[8] on the grounds that appellants lacked standing to bring the action.[9] We agree with the District Judge and conclude that both appellants lack standing as federal taxpayers because they have suffered no judicially cognizable injury in this

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* After oral argument, District Judge Justice, United States District Judge for the Eastern District of Texas, the third member of the panel, who was sitting by designation pursuant to 28 U.S.C. § 292(d), found it necessary to recuse himself. By random selection, Circuit Judge Wilkey was assigned to replace him on the panel and was assigned to write the opinion on 9 February 1977.

[1] Jurisdiction is alleged under 28 U.S.C. §§ 1340, 2201, 2202, and 5 U.S.C. §§ 702, 703. Amended Complaint, ¶ 2, Joint Appendix (J.A.) at 39. These latter statutory provisions no longer serve as a basis for jurisdiction in the federal courts. *See Califano* v. *Sanders*, 45 U.S.L.W. 4209, 4211 (23 Feb. 1977).

Prior to the filing of this suit in the District Court, appellants filed a petition with the Commissioner of the Internal Revenue Service seeking to have the Revenue Rulings at issue in this case revoked. According to appellants, no response was made to the petition. Amended Complaint, ¶¶ 23, 24, J.A. at 45.

[2] Amendment Complaint, J.A. at 45.

[3] *Id.* at 45-46.

[4] *Id.* ¶ 3, J.A. at 39.

[5] *Id.* ¶ 4(a), J.A. at 39.

[6] *Id.* ¶ 4(b), J.A. at 39-40. The oil well is located in Venango County, Pennsylvania; the oil produced at this location is not subject to price controls imposed by the federal government. *Id.*

[7] The defendants in this case are the Secretary of the Treasury and the Commsisioner of the IRS. Both are sued in their official capacities. Amended Complaint, ¶¶ 5, 6, J.A. at 40.

[8] Appellants filed their original complaint on 17 June 1974. The complaint was amended on 13 August 1974 to reflect appellant Field's acquisition of the entire working interest in a domestic oil well.

[9] 390 F. Supp. 927 (D.D.C. 1975).

capacity, and thus affirm the District Court on the rationale stated in its opinion.[10] In addition, we conclude that Appellant Field, while suffering injury in a fact as a competitor dealing in oil extraction and production, does not assert an interest that falls within the "zone of interests" protected by the relevant provisions of the Code and therefore does not have standing in this context. Accordingly, we affirm the order of the District Court.

I. The Nature of Appellants' Challenge

A. *The Challenged Agency Action*

Section 901(b) of the Code allows qualified citizens of the United States and domestic corporations to claim

[10] As federal taxpayers, both appellants claim "a personal pecuniary interest in requiring that the IRS assess and collect taxes owed by other taxpayers to the fullest possible extent under the provisions of the Code." Amended Complaint, ¶¶ 3, 4, J.A. at 39. According to the appellants, the published and private IRS rulings at issue in the case cause injury in fact to this interest by decreasing the amount of taxes paid into the Federal Treasury by United States companies operating abroad in the area of oil extraction and production. Appellants aver that the monetary loss to the United States Treasury attributable to the treatment of the foreign income taxes on income from oil production as creditable against United States tax liability, rather than as deductible costs of business, amounted to $3 billion in 1974. Amended Complaint, ¶ 16, J.A. at 42. According to appellants, this decrease in revenue causes their federal income taxes to rise in some unstated amount.

With respect to these claims of taxpayer standing, we affirm the District Court's finding of no injury in fact and adopt the reasoning of the District Court as put forth at 390 F.Supp. 932-38. Since appellants have not satisfied this basic constitutional requirement of injury in fact, there is no need to explore the other inquiries relevant to prudential limitations on standing. *See* text and notes at notes 29 to 34, *infra*. *See also Harrington* v. *Bush*, No. 75-1862, Slip Op. at 28 n.68 (D.C. Cir. 18 February 1977).

a tax *credit* for "the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country. . . ."[11] This credit can be taken only for foreign income taxes paid;[12] no credit is allowed for the payment of excise taxes, severance taxes, mineral royalties, or similar payments to foreign governments. Excise taxes, severance taxes, and royalty payments are treated, when appropriate, as ordinary business expenses and therefore result in *deductions* from gross income rather than in tax credits which can offset tax liability on a dollar-for-dollar basis.

Beginning in the 1950's, the principal oil producing nations in the Middle East, North Africa and South America promulgated a series of formal income tax statutes which imposed net income taxes on United States companies producing oil in those nations.[13] In 1955, the IRS published Revenue Ruling 55-296 which allowed a foreign tax credit for income taxes paid to Saudi Arabia.[14] In 1968 the Service promulgated Revenue Ruling 68-552 allowing a foreign tax credit for income taxes imposed by Libya.[15] In addition, the IRS has issued several private rulings allowing foreign tax credits for

[11] 28 U.S.C. § 901(b)(1).

[12] 28 U.S.C. § 903 provides that "the term 'income, war profits, and excess profits taxes' shall include a tax paid in lieu of a tax on income, war profits, or excess profits otherwise generally imposed by any foreign country. . . ." Appellants claim that the payments to foreign nations at issue in this case cannot be considered as "in lieu of" taxes within the meaning of Section 903. We accept this contention as being true for the limited purpose of ruling on the question of standing. *See* note 19, *infra*.

[13] Amended Complaint, ¶ 9, J.A. at 40.

[14] 1955-1 Cum. Bull. 386.

[15] 1968-2 Cum. Bull. 306.

income taxes levied by Iran, Kuwait, and Venezuela in connection with oil production in those countries.[16]

Appellants contend that the income taxes paid by United States companies to the foreign nations listed above are not creditable taxes within the meaning of Section 901(b) of the Code. Rather, appellants assert that these taxes are in substance either rolayties paid for the right to extract oil from land owned by the foreign nations, or excise, severance, or similar taxes which are not creditable under Section 901(b).[17] Appellant Field, as the owner of a domestic oil well, pays the owner of the land on which his well is located a regular royalty payment for the right to extract oil from the land;[18] under the Code, appellant can deduct these payments from gross income but cannot credit them against his tax liability. In effect, appellants allege that the IRS has exalted form over substance in allowing the tax credits at issue; all of the injuries which appellants put forth to support their standing flow from this decision to treat the foreign income taxes as creditable taxes, rather than as deductible expenses, for their taxpaying competitors.

Having outlined the substantive merits of appellants' claims, it remains to relate this aspect of the case to the issue of standing. Under the relevant Supreme Court directive, we "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." [19] This standard of review dictates that we assume that the IRS has improperly allowed a tax credit for the payments to foreign nations in connection with oil extraction and production.

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[16] Amended Complaint, ¶ 10, J.A. at 41; Brief for Appellees at 5.

[17] Amended Complaint, ¶ 12, J.A. at 41.

[18] Amended Complaint, ¶ 18, 19, J.A. at 42.

[19] *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975).

This assumption as to illegality does not in and of itself confer standing on anyone to challenge the illegality.[20] Rather, as this court has stated, "*the proper inquiry is whether the illegality does injury to an interest of the complaining party.*" [21] We now turn to an examination of the interests and injuries put forth by appellant Field to support his standing as a competitor in this case.[22]

B. *Competitor Standing*

As an independent domestic oil producer, appellant Field competes in the domestic market with those companies which are granted tax credits for the income taxes paid to foreign nations. As a competitor, appellant Field claims that the Internal Revenue Code grants him a protected interest in competitive fairness and equity in matters of federal taxation which has been injured by the published and private rulings made pursuant to Section 901(b). Appellant believes that this asserted interest confers on him the right to "challenge[] as inequitable and illegal the favorable treatment received by others as a result of Internal Revenue Service action." [23]

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[20] *See United States* v. *Richardson*, 418 U.S. 166, 179 (1974); *Harrington* v. *Bush, supra,* note 10, Slip. op. at 11 n.31.

[21] *Harrington* v. *Bush, supra* note 10, Slip. op. at 11 (emphasis in original).

[22] The issue of taxpayer standing has been dealt with in text and notes at notes 4 to 10, *supra,* and will not concern us during the remainder of our analysis.

[23] Brief for Appellants at 18. There are statutory provisions providing for judicial review of IRS action at the request of one whose taxes are in question. See 26 U.S.C. § 6123(a). These challenges usually take place within the context of a refund or deficiency suit.

[Continued]

Appellant alleges two injuries in his capacity as a competitor. As the first injury appellant Field alleges that the IRS rulings "result in his obtaining lower prices for his oil production than he would receive if the international companies could only deduct and not credit their oil production related payments." [24] The rulings at issue in this case enable the international companies to pay far less income tax to the United States than if these payments were merely deductible. A substantial portion of the oil produced in Saudi Arabia, Libya, Kuwait, Iran and Venezuela by United States companies is exported to the United States. The prices charged by the international companies largely determine the market price for uncontrolled crude oil received by independent producers such as appellant Field. According to appellants, the lower taxes paid by the international companies allow these companies to sell their foreign oil in the United States at lower prices than would prevail if the companies could only deduct and not credit their foreign income tax payments.[25] Thus, as a consequence, appellant Field contends that the IRS rulings result in competitive injury due to the loss of potential income in the sale of his domestically produced oil.

The second injury of a competitive nature alleged by Appellant Field concerns the impact of the challenged rulings on the value of his operating interest in his domestic oil well. According to appellant Field, the

[23] [Continued]

Appellant presents a different type of case in this action by attempting to use alleged competitive injury to himself as the basis for the challenge of the IRS action; he does not put forth the question of his own tax liability or that of the international companies taking advantage of the tax credit allowed by the challenged rulings as the basis for his standing.

[24] Amended Complaint, ¶ 18, J.A. at 44.

[25] *Id.* § 19, J.A. at 44.

challenged IRS rulings increase the net income from foreign oil production over what it would be if the foreign payments could only be deducted from gross income for federal tax purposes.[26] Thus, as a result of the rulings, foreign oil production yields higher investment returns and investors are more willing to invest in foreign oil production than they would be if the rulings had not been promulgated.[27] The value of foreign oil well investments is therefore increased relative to similar domestic investments, to the alleged competitive detriment of appellant Field.

The asserted competitive interest and alleged injuries presented by appellant Field will now be tested against the standards developed by the Supreme Court in the area of standing.[28]

II. Analysis of Standing Claims

A. *Preliminary Considerations*

The standing doctrine has two sources: the "case or controversy" requirement of Article III of the Constitution,[29] and judicially imposed rules of self-restraint known as "prudential limitations." [30] In the context of this case, we have occasion to apply both the constitutional and prudential dimensions of the standing doctrine and thus to illuminate the relationship between

[26] *Id.*

[27] *Id.*

[28] *See Harrington* v. *Bush, supra* note 10, Slip. op. at 28 n.68.

[29] The Supreme Court first clearly stated the constitutional nature of the injury in fact requirement in *Flast* v. *Cohen*, 392 U.S. 83 (1968) and has been consistent in this interpretation in all subsequent discussions of standing.

[30] *See Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

these two elements of the doctrine.[31] The Article III constitutional requirement is one of "injury in fact, economic or otherwise;" [32] such injury is the "irreducible constitutional minimum which must be present in every case." [33] If a court finds that there is no injury in fact, "no other inquiry is relevant to consideration of . . . standing." [34] The vast majority of the case law on standing at all levels of the federal court system has been directed at defining this constitutionally based concept of injury in fact.

Prudential limitations, on the other hand, are not constitutional requirements; these limitations are developed and imposed by the Supreme Court in its supervisory capacity over the federal judiciary.[35] It is clear that Congress may remove these prudential limitations by statute; Congress has chosen to exercise this authority on various occasions.[36] There has been no Congressional authorization of appellants' action here; therefore, the prudential limitations developed by the Supreme Court

[31] We deny the claims as to taxpayer standing because we find no injury in fact; *see* note 10, *supra*. With respect to competitor standing, however, we recognize that injury in fact has occurred but proceed to deny standing based on a prudential limitation; *see* Part II.B.2, *infra*.

[32] *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 152 (1970).

[33] *Harrington* v. *Bush*, *supra* note 10, Slip op. at 28 n.68.

[34] *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 227 n.16 (1974).

[35] *See, e.g.*, *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

[36] For a collection of statutes in which Congress has removed the prudential standing barriers, *see* C. Wright, *et al.*, *Federal Practice and Procedure* ¶ 3531 (p. 71, 1977 Supplement). For the clearest example of the operation of this Congressional control over prudential limitations in the judicial context, *see* *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972).

are fully applicable in this context.[37] To date, at least three prudential limitations have been announced by the Court. The first of these limitations to be enunciated, and the one which will be the focus of our concern in Part B.2, *infra*, is the so-called "zone test:" [38] "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or consitutional guarantee in question." [39] The two additional prudential limitations relating to causation [40] and redressability of the griev-

[37] We believe that the fact that the limitations of the standing doctrine beyond injury in fact are termed "prudential limitations," does not mean that the lower courts have discretion as to whether to apply these limitations or not. The Supreme Court has announced these prudential limitations in its supervisory capacity over the federal judiciary and, in the context of cases such as the one now before us, we believe there is a nondiscretionary duty to apply the limitations. This duty to apply the standard does not detract from the discretion involved in determining whether the standard has been satisfied.

[38] The "zone test" is not a "test" in the sense that it is capable of mechanical application to a set of facts with an easily discernable and certain result. Rather, it is, as this court has stated, one of a "*series of inquiries*" designed to determine if a particular party has standing. *Harrington* v. *Bush*, *supra* note 10, Slip op. at 28 (emphasis in original). As an inquiry, the standard involves a great deal of discretion in its application. *See* note 64, *infra*. It is, therefore, for purposes of convenience that we refer to it as a "test;" this lable is not intended to obscure the discretion and necessary ambiguity inherent in the inquiry.

[39] *Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153 (1970).

[40] *See Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617 (1973); *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1973). *See also Harrington* v. *Bush*, *supra* note 10, Slip op. at 28 n.68.

ance [41] need not be faced in the context of this case. The application of the zone test to deny standing in this case bears out the notion that, as this court has stated, "a valid claim of standing rests on more than [the] assertion of [a judicially] cognizable injury." [42]

B. *Competitor Standing*

1. *Injury in Fact.* We conclude that appellant Field has suffered injury in fact in his capacity as a competitor.[43] Although appellant's economic injury is relatively small in magnitude,[44] this does not negate our finding of injury in fact.[45] Appellant Field has alleged "a distinct and palpable injury to himself" [46] which meets the requirements of Article III of the Constitution; given that the constitutional hurdle has been surmounted, we must now proceed to examine appellant's claim in light of the zone test.[47]

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[41] *See Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 28 (1976); *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 222 (1974). *See also Harrington* v. *Bush*, *supra* note 10, Slip op. at 28 n.68.

[42] *Harrington* v. *Bush*, *supra* note 10, Slip op. at 28 n.68.

[43] *See Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150 (1970); *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970).

[44] The oil well owned by appellant Field is quite small; *see* Brief for Appellants at 11.

[45] *See United States* v. *SCRAP*, 412 U.S. 669, 689 n.14 (1973) (identifiable trifle is sufficient for purposes of standing doctrine). The appellee's arguments to the contrary are frivolous; *see* Brief for Appellees at 10, 26-27.

[46] *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975).

[47] *See Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1976).

2. *Zone of Interests.* The zone test was announced and applied in 1970 in the companion cases of *Association of Data Processing Organizations* v. *Camp* [48] and *Barlow* v. *Collins*.[49] In addition, the test has been applied by the Court in two subsequent cases.[50] In applying the zone test in these four cases, the Court has not attempted a detailed explanation of the purpose, meaning, or scope of the standard. The deficiencies, ambiguities, and unresolved questions inherent in the zone test have been the subject of voluminous criticism.[51] There has also been confusion in the application of this prudential standard in the courts.[52] Some courts have chosen to ignore the zone test;[53] at least one circuit court has chosen forthrightly to state its opposition to the test.[54] Perhaps the most common pattern is to announce in conclusory terms that the zone standard has or has not been satisfied.[55]

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[48] See note 32, *supra*. The *Data Processing* case also involved a claim of competitive injury.

[49] 397 U.S. 159 (1970).

[50] *Investment Co. Inst.*, v. *Camp*, 401 U.S. 617 (1971); *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970).

[51] A complete bibliography of these criticisms is set forth in Note, Standing to Challenge Exclusionary Land Use Control Devices in Federal Courts after *Warth* v. *Seldin*, 29 Stan.L. Rev. 323 (1977). (hereinafter referred to as Note).

[52] *See, e.g., Pecos Ass'n* v. *Stans*, 452 F.2d 1233, 1235 (10th Cir. 1971) ("The interests are within the zone protected by the APA").

[53] *See, e.g., Florida* v. *Weinberger*, 492 F.2d 488 (5th Cir. 1974).

[54] *Park View Heights Corp.* v. *City of Black Jack*, 467 F.2d 1208 (8th Cir. 1972).

[55] *See* K. Davis, *Administrative Law of the Seventies* 512 (1976).

The zone test admittedly presents the courts with an ambiguous and imprecise standard to apply; such ambiguity and imprecision are certainly not foreign to the courts, however, and none of the approaches to the zone test outlined above has contributed to the clarification of the concept.[56] Suggestions that the zone test is no longer a constituent element of the standing doctrine are, in our view, clearly incorrect. Indeed, all of the available evidence in Supreme Court cases suggests that the zone standard remains the law in this context.[57] We believe that the zone test is fully applicable in this context; since we rest our denial of standing to appellant Field as a competitor squarely on the zone standard, we shall put forth in some detail the manner in which this decision has been reached.

a. *Purpose of Zone Test.* The zone test serves no independent purpose but, rather, constitutes one method to ensure that the basic purposes and policies of the standing doctrine itself are effectuated. Although the purpose of the standing doctrine has been the subject of consider-

[56] *See* notes 52 to 54, *supra*. In another context, Justice Powell has recognized that the prudential limitations are "less easily defined" inquiries than those involving injury in fact. *Singleton* v. *Wueff*, 44 U.S.L.W. 5218 (29 June 1976) (Powell, J., concurring in part and dissenting in part). The ambiguous nature of the prudential inquiries is not, without more, a valid reason to ignore the zone standard.

[57] In all of the Supreme Court's standing decisions rendered since the zone test was announced in 1970 in which the zone standard has not been applied but in which it has been appropriate to make reference to this test, the Court has cited this standard with approval. *See Sierra Club* v. *Morton*, 405 U.S. 727, 733 (1972); *United States* v. *SCRAP*, 412 U.S. 669, 686 n.13 (1973); *United States* v. *Richardson*, 418 U.S. 166, 176 n.9 (1974); *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 224 n.14 (1974); *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 n.19 (1976).

able debate among the commentators,[58] the Supreme Court has been consistent in identifying two basic purposes of the doctrine. The first purpose, or basic policy, is to ensure the complete adversarial presentation of the issues before the court.[59] The second purpose concerns the "proper—and properly limited—role of the courts in a democratic society."[60] That is, the standing doctrine can be employed to define the proper judicial role relative to the other major governmental institutions in the society.[61] As the Court has stated, the "prudential rules of standing . . . serve to limit the role of the courts in resolving public disputes."[62]

We believe that the zone test is particularly suited to the task of furthering the second stated purpose of the standing doctrine relating to the role of the federal judiciary. The zone test, by its very language, implicates the relationship between the legislative and judicial branches as the predominant factor in its operation—"the zone of interests to be protected or regulated by the *statute* . . . in question."[63] Thus, the zone test serves the purpose of allowing courts to define those instances when it believes the exercise of its power at the instigation of a particular party is not congruent with the mandate of the legislative branch in a particular subject area.

[58] *See* Note, *supra* note 51, at 335 n.72.

[59] *See Baker* v. *Carr*, 369 U.S. 186, 204 (1962); *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968).

[60] *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975).

[61] *See generally United States* v. *Richardson*, 418 U.S. 166 (1974); *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208 (1974).

[62] *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975).

[63] *See* note 39, *supra*. (emphasis added).

By its choice of language, the Supreme Court has indicated that the zone test is a quite generous standard;[64] on the other hand, the test is obviously meant to serve as a limitation on those who can use the federal courts as a forum for grievances emanating from agency action taken pursuant to a particular statutory mandate. These competing considerations serve to frame the bounds of a court's discretion in applying the zone test. The discretion of a court to deny standing on the basis of the zone standard is not undefined; the zone test limitation is grounded in Congressional action as embodied in statute. The zone test therefore cannot be used arbitrarily to deny access to the courts; it is based on discerned Congressional purpose, a purpose which can be more clearly or differently defined as Congress wishes.

The most severe difficulties with the zone test derive from questions as to the proper technique to employ in order to discern the Congressional intention in a manner which does not defeat other basic tenets of the law of standing. In particular, these difficulties revolve around the decision as to which statutory provision to examine for evidence of regulatory or protective intent and the proper role of legislative history in making the threshold decision on standing.

b. *Proper Statutory Provision.* The IRS rulings being challenged in this case were issued pursuant to Section 901 of the Code. The question then becomes: does the court look to this section of the statute (the Code) to determine which interests are arguably to be regulated or protected for purposes of the zone test, or should the court look to other sections of the statute for evidence of arguable regulatory or protective intent? The Supreme Court decisions dealing with the zone test do not provide

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[64] The particular words which give the test this quality are "arguably" and "zone".

a conclusive answer to this inquiry.[65] As will be seen, this decision is of particular significance in the context of this case.[66] Appellants urge us to adopt the second alternative—to examine statutory provisions other than those which form the basis for the lawsuit.[67] In this regard, appellants refer us to additional provisions in the Code which they believe contain the necessary evidence of Congressional intent sufficient to satisfy the zone test in this case.[68] We cannot agree with this approach; instead, we shall look only to Section 901 of the Code in our application of the zone test. Why we should do so readily becomes apparent.

Our decision to adopt this approach rests on two reasons—one general, the other with particular reference to the statutory scheme involved in this case. Generally, the statutory provision at issue in a given case, in this instance Section 901 of the Code, frames the substantive issue which a court will decide if the action proceeds to a determination on the merits. If the necessary arguable intent is found in the particular provision, this fact further ensures that the complaining party will have a strong connection to the controversy and that it will serve the policy of complete adversariness in the litigation which has as its focus the particular statutory provision.[69] If, on the other hand, standing is granted on the basis of

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[65] *See* cases listed at notes 48, 50, *supra.*

[66] *See* text at notes 69 to 70, *infra.*

[67] Appellants contend that we "must examine [the] general purpose" of the Code. (Brief at 20) to determine if the competitive interests "are within the zone of interests protected by the Internal Revenue Code." (Brief at 8). *See also* Brief for Appellants at 17-19.

[68] These additional provisions of the Code are sections 501, 502, 511-13, and 7805(b).

[69] *See* text and notes at notes 58 to 59, *supra.*

intent inferred from statutory provisions which perhaps embody *different* goals and policies, this connection to the controversy may well be lessened. Therefore, as a general rule we believe that the particular statutory section should be the focus of analysis when applying the zone test.

The wisdom of this decision to examine the particular statutory section is particularly apparent in the context of this case. The Internal Revenue Code is a extraordinarily complex statute which does *not* have a single, unified purpose. Rather, the Code is intended to accomplish a wide variety of economic and social goals and purposes. If litigants are allowed to transfer the Congressional purpose and intent embodied in one section of the Code into other contexts and situations regulated by different provisions of the Code, the possibilities for litigation would indeed be endless. We do not therefore believe that litigants can "borrow" the arguable regulatory or protective intent embodied in one provision of the Code, and apply it to a provision where that intent is not evident, in order to satisfy the zone test. A contrary decision in this context would distort the role of the courts in relation to the legislative branch, precisely what the zone test serves to prevent, in the area of revenue collection.

In support of their argument that the court should look beyond the particular statutory provision, appellants refer us to the decision of this court in *Constructores Civiles de Centroamerica, S.A.* v. *Hannah*.[70] In that case action taken pursuant to the Foreign Assistance Act of 1961[71] was challenged. In determining that appellants in that case satisfied the zone test, the court looked to the

[70] 459 F.2d 1183 (D.C. Cir., 1972).

[71] 22 U.S.C. § 2251 et. seq. (1970).

general statement of policy found in the statute.[72] Appellants in this case contend that the court's reliance on the broad general language of the preamble in the *Constructores* case supports their view that purposes embodied in other sections of the Code support their standing under the zone test. The court's action in *Constructores* was not, however, inconsistent with the technique we have chosen to employ in this case. In *Constructores* it was acceptable to examine both particular and general provisions because these provisions shared an identity of purpose. Indeed, in this context, it was necessary to examine the general language of the preamble to ensure that a grant of standing would not be inconsistent with the statutory purpose. No such similar situation is presented in this case and we therefore confine our inquiry to Section 901 of the Code.

c. *The Role of Legislative History.* In the process of deciding disputes which are properly before them, courts regularly examine in some depth and in great detail the legislative history of statutes involved in the disputes. In the context of applying the zone test to the issue of standing, however, such full-scale examinations of legislative history present special dangers and should therefore be avoided.[73] The dangers and deficiencies in the traditional approach to legislative history in this context are three in number.

First, and most significant, a full-scale examination of the legislative policy underlying a statutory provision may well lead to a prejudgment of the merits of the case. A canvassing of the entire legislative background may lead to a decision on the question of standing based on an assessment of the strength or weakness of the claims

[72] 459 F.2d 1183, 1188-89 (1972).

[73] *See Barlow* v. *Collins*, 397 U.S. 159, 168 (1970) (Brennan, J., concurring in the result and dissenting).

being presented.[74] Such a result or tendency would be inconsistent with a primary theme in the law of standing —that the question of standing is a matter apart and distinct from the merits of the substantive claims put forth.[75] It is totally acceptable to grant standing to a party to pursue an unsuccessful claim; a traditional examination of legislative history might well undermine this basic proposition.

Second, the question as to precisely which interests are meant to be regulated or protected by a statutory provision is not likely to have been faced in the legislative history in any convincing or dispositive manner. Rather, the express language of the statute is likely to be more accurate in this regard. Thus, as a source of evidence as to whether the particular interests of a particular plaintiff are within the relevant zone,[76] the legislative

[74] It was the fear of confusing the preliminary issue of *standing* with the *merits* which caused Justices Brennan and White in *Barlow* v. *Collins*, 397 U.S. 159, 168-170 (1970) to argue that examination of standing should stop with the constitutionally-spawned inquiry as to injury in fact and should not reach the "zone of interest" inquiry at all. By not relying on legislative history, as the Supreme Court indicated in *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45, 46 (1970) was proper, we avoid the danger of the court settling the merits in the guise of ruling on standing and thus meet the concern voiced by Justices Brennan and White.

[75] *See, e.g., Ass'n of Data Processing Serv. Orgs., Inc.* v. *Camp*, 397 U.S. 150, 153 (1970); *Warth* v. *Seldin*, 422 U.S. 490, 500 (1975).

[76] We are aware of the confusion surrounding the meaning of which interests are relevant to the zone test. *See* K. Davis, Administrative Law Treatise § 22.00-1 (1970 Supplement). Essentially, the confusion surrounds what exactly has to fall within the relevant zone: 1) the parties themselves; 2) the interests of the parties in general; or 3) the particular interest the parties are asserting in the litigation. It seems clear to us that the particular interests are the relevant interests in the context of an application of the zone standard. Professor Davis agrees. *Id.*

history is likely to be unilluminating.[77]

Third, a full-scale examination of legislative history presents the distinct possibility that the generous nature of the zone test, which results from the language of the test itself, will be undermined. Such an approach may lead to a requirement that there be affirmative evidence that the Congress intended that a plaintiff situated precisely as the plaintiff then standing before the court be regulated or protected. Any tendency to move in this direction would detract from the flexibility of the zone standard provided by the requirement that the plaintiffs' interest be only "arguably" within the zone. Thus, if Congress had in general terms legislated against competition in a statute, it is not difficult to find that particular competitive interests, which may not have been mentioned in the legislative history at all, are "arguably" within the zone of interests.[78] The "arguable" language of the zone test thus serves to resolve potential ambiguities in the legislative history and obviates the need to consult it in the same detail as is done when the merits of the dispute are being resolved.

Given these deficiencies in the traditional techniques of fully examining legislative history, we believe the appropriate test to be as follows: whether the complaining party has stated an interest which is arguable from the face of the statute. Although the Supreme Court has not explicitly endorsed this as the appropriate operational

[77] The success of a workable standing doctrine must be measured in some degree by the ease with which it can be applied. This more limited role for legislative history at this threshold stage in litigation promotes this additional goal.

[78] This is essentially what the Supreme Court did in *Arnold Tours* v. *Camp*, 400 U.S. 45 (1970).

technique, it has come close to so doing in one case.[79] Thus, we believe that this approach is both consistent with the guidance we have been given by the Supreme Court and that it is supportive of other policies underlying the standing doctrine.[80]

C. *Application of Zone Test to Appellant Field.*

Having described what we believe to be the purpose of the zone test and the manner in which it should operate, it is now possible to formulate with precision the relevant zone test inquiry with respect to appellant Field's standing as a competitor: did Congress arguably legislate with respect to competition in Section 901 of the Code so as to protect the competitive interests of domestic oil producers?

We answer the posed query in the negative for the following reasons. The purpose of the tax credit provision of Section 901 of the Code is to prevent the double taxation of any United States companies operating abroad. This purpose is clear from the face of the statute itself, and has been consistently confirmed in the case law dealing with this particular provision in other contexts.[81]

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[79] *Id.*

[80] Having stated and justified this general approach to legislative history, it is necessary to state a *caveat.* We do not rule out *any* role for legislative history at this stage, and we would expect to be informed by the parties if the legislative history contained clear evidence of an intent either to allow the appellant's interests as a basis for standing or to deny standing to a party in this position.

[81] *See, e.g., Bunet* v. *Chicago Portrait Co.,* 285 U.S. 1, 2 (1932); *Bank of America National T.E.S. Ass'n* v. *United States,* 459 F.2d 513, 519 (Ct. Cl. 1972), *cert. denied,* 409 U.S. 949 (1972); *Rinehart* v. *United States,* 429 F.2d 1286, 1288 (10th Cir. 1970); *Associated Tel. & Tel. Co.* v. *United States,* 306 F.2d 824, 832-33 (2d Cir. 1962), *cert. denied,* 371 U.S. 950 (1962).

The tax credit envisioned in Section 901 is also available to U.S. companies operating outside the sphere of oil extraction and production, with the same purpose of avoiding the double taxation of United States taxpayers, whether such companies have domestic competition or not. Given this purpose, it is obvious that the protective intent of the statutory section extends to all those U.S. companies doing business abroad and paying foreign income taxes.

In addition it cannot be said that parties in the position of appellant Field are arguably intended to be regulated by the provision granting tax credits; that is, appellant Field cannot be said to fall within the regulatory field of concern without stretching the concept of regulation to implausible limits.[82] Therefore, we conclude that the interests being asserted by Appellant Field as a competitor are not the interests arguably intended to be protected by the tax credit provision of section 901 which is the statutory basis for the challenge in this case. The congruence between the purpose of the statute (to prevent the double taxation of particular parties) and the interests asserted by appellant (competitive interest in fairness) is not sufficient to invoke the federal judicial power.[83]

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[82] See text and notes at notes 86 to 89, *infra.* Appellant is not directly regulated by the rulings being challenged in this case. Rather, a more appropriate description is that he operates in an industry which is regulated by the rulings but does not operate in that sphere of the industry which is the object of the regulation.

[83] *Cf.* cases cited at notes 48-50, supra; in these cases the congruence between the purpose of the statute (to legislate against competition generally) and the asserted interests (particular *types* of competition) was sufficient to satisfy the "arguable" terminology of the zone test.

We find it significant, as we noted earlier,[84] that appellants do not in their submissions to us attempt to persuade the court that appellant Field's asserted competitive interests fall within the zone of interests relevant to Section 901. Rather, appellants rely entirely on other provisions of the Code to argue that the zone sandard has been satisfied.[85] We have rejected this approach and put forth our reasons for so doing in part II.B.2(b), *supra*. This failure to address the issue of the zone standard as it relates to the statutory provision being challenged suggests that a convincing argument in this regard is lacking. Perhaps the most appropriate way in which we can emphasize the strength of our decision to deny standing on the basis of the zone standard is to sketch out the arguments which would need to be made in order to satisfy the zone standard in this context.

The argument that appellant Field's interests fall within the relevant zone of Section 901 rests on the premise that Section 901 can arguably be read not only as a decision to grant a tax credit to those who have paid foreign income taxes but also as a decision *not* to grant a tax credit to those who have made other sorts of payments, such as royalties, to foreign governments.[86] Under this "reverse zone of interest" analysis, competitors such as appellant Field could argue that they fall within the zone protected by the negative implication of the statutory provision.

We cannot accept this "reverse zone of interest analysis" which would extend standing to all those who may

[84] *See* note 67, *supra*.

[85] *See* note 68, *supra*.

[86] This seems to rest on the misapprehension that the statute is directed exclusively at the tax scheme and problems of the petroleum industry, which we pointed out above was not so.

be able to allege injury because they were *not* regulated or protected by a particular statutory provision. Such an approach would render the zone standard meaningless. Although the text is a generous one, the terms "arguable" and "zone" are subject to definition in the context of particular factual situations such as presented in this case. To define the terms by reference to what they do not mean in these factual settings is clearly inappropriate.

There is one further argument concerning the zone of interests surrounding Section 901 which deserves mention. It can be argued that the decision to grant the international companies a tax credit has competitive *consequences* for parties such as appellant Field which bring him within the relevant zone. That is, since the challenged rulings have an *impact* on appellant Field in his capacity as an oil producer, he must therefore fall within the intended zone of Section 901. Every decision by a government agency generates consequences and various forms of impact on a wide range of valid interests held by a diverse range of parties. There is no doubt that the decisions embodied in the challenged revenue rulings have had an impact on appellant Field. But the concepts of *consequence* and *impact* are not the proper guideposts to define the relevant zone of interests; reference to these concepts does not aid greatly in determining whether a protected interest exists, but rather serve as part of the vocabulary in defining the relationship between an alleged injury and an asserted interest.

Thus, *consequences* and *forms of impact* do play an important role in the law of standing; these concepts are relevant in determining whether there has been *injury in fact*. So, we have not ignored the competitive consequences and impact of the challenged rulings on appellant Field; we have taken these into account in determining that appellant has suffered competitive injury

in fact. A standing determination, such as the one involved with appellant Field as a competitor, involves separate stages of analysis;[87] we cannot simply transfer the analytical concepts employed in one stage (injury in fact) to the other stages of analysis dealing with prudential limitations. We cannot define the zone of interests as being the equivalent in every case of the "zone of impact" or the "zone of consequences." To do so would establish a standing doctrine based solely on the existence of harm to a party; it is clear that, under current Supreme Court doctrine which we are obliged to apply, such a result is unacceptable[88] as contrary to the stated purposes of the doctrine.[89]

In summary, we cannot look to a "reverse zone of interests" or to the consequences and impact of the challenged agency action to define a zone within which appellant Field's competitive interests fall. Rather, we must make our decision as to whether the party before us is an intended beneficiary of the statutory provision on the basis of the interests we believe Congress arguably intended to regulate or protect in the legislation. We cannot conclude that Congress arguably intended to regulate or protect the competitive interests of appellant Field in Section 901. The existence of competitive ramifications flowing from the challenged agency action is not sufficient evidence to infer that Congress arguably intended to protect or regulate competitive interests. The arguments to the contrary fail for the reasons cited above. Without a clearer indication from Congress from which could be constructed a plausible argument that the competitive interests are "arguably" to be regulated or protected, we cannot as a prudential matter make the

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[87] *See Harrington* v. *Bush*, *supra* note 10, Slip op. at 28 n.68.

[88] *Id.*

[89] *See* notes 59 and 60, *supra*.

federal courts available as a forum for third-party challenges to IRS action such as the one presented here.[90]

Conclusion

We recognize that as the result of our decision in this case it is likely that the revenue rulings at issue in the case may go unchallenged in federal court due to the lack of a proper party to sue. This eventuality does not, however, operate in favor of granting standing to the parties in this case.[91] The standing doctrine should not be manipulated to guarantee that there is a party to bring any action in court that some persons may think desirable to have adjudicated. Since we cannot conclude that appellants have standing under the current framework of analysis provided by the Supreme Court, the order of the District Court in this case is

Affirmed.

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[90] A similar challenge to an IRS ruling was made in *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26 (1976). Indeed, this case was held in abeyance by order of this court to await guidance from the Supreme Court in this area. In *Simon*, however, the Court denied standing on grounds not relevant to this case.

The Court in *Simon* explicitly chose "not to reach the question of whether a third party ever may challenge IRS treatment of another . . . ." 426 U.S. at 37. The appellee in this case has urged us to adopt such a blanket prohibition (Brief for Appellees at 37-43), but we, too, decline to speak to this issue.

[91] *See* note 20, *supra*.

APPENDIX B

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1782

AMERICAN SOCIETY OF TRAVEL AGENTS, INC., ET AL., APPELLANTS

v.

MICHAEL BLUMENTHAL, SECRETARY OF TREASURY, ET AL.

Appeal from the United States District Court for the District of Columbia

(D.C. Civil 74-1081)

Argued October 20, 1976

Decided September 15, 1977

Thomas J. Bacas, with whom *Paul S. Quinn* was on the brief, for appellants.

Leonard J. Henzke, Jr., Attorney, Tax Division, Department of Justice, with whom *Scott P. Crampton*, Assistant Attorney General, *Earl J. Silbert*, United States

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Attorney, and *Ann B. Durney*, Attorney, Tax Division, Department of Justice, were on the brief, for appellees.

Before BAZELON, *Chief Judge*, MCGOWAN and ROBB, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* MCGOWAN.

Dissenting opinion filed by *Chief Judge* BAZELON.*

MCGOWAN, *Circuit Judge*: This is an appeal from the District Court's dismissal of a complaint challenging the administration of the federal tax laws, not in relation to the tax liabilities of plaintiffs-appellants, but as to third parties not before the court. It thus presents a threshold issue of standing to sue reminiscent of Justice Stewart's observation, concurring in *Simon v. Eastern Kentucky Welfare Rights Organization, et al.*, 426 U.S. 26, 46 (1975), that he could not "imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else." Because *Eastern Kentucky*—an obviously relevant case—was pending before the Supreme Court at the time this appeal was first scheduled for oral argument, we deferred our consideration to await the Supreme Court's outcome. We now hold, by reference to the Supreme Court's disposition of *Eastern Kentucky*, that there was a fatal want of standing here; and we affirm the District Court's judgment for that reason.

I

Appellants, the American Society of Travel Agents (ASTA) and several individual travel agencies, complain

* The dissenting opinion filed by Chief Judge Bazelon in this case is also to be filed as a dissent to No. 75-1304, *Tax Analysts and Advocates v. Blumenthal* (D.C. Cir., June 15, 1977).

of the failure of the federal tax authorities to assess taxes upon certain income received by the American Jewish Congress (AJC) and other organizations enjoying tax exemptions under § 501(c)(3) of the Internal Revenue Code.[1] In particular, they object to the tax-exempt treatment accorded to income derived from the operation of travel programs by § 501(c)(3) organizations. Appellants assert that such income should be taxed as so-called unrelated business income, *i.e.*, income obtained from a business the conduct of which is "not substantially related . . . to the exercise of performance . . . [of the] purpose or function constituting the basis" for an organization's § 501 exemption. *See* I.R.C. § 513(a). Alternatively, appellants contend that the AJC and other exempt organizations have become so heavily involved in the travel business that their § 501(c)(3) exemptions should be eliminated altogether.

By memorandum order, the District Court decided that neither count of appellants' complaint stated a claim upon which relief could be granted. 36 A.F.T.R.2d 75-

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[1] I.R.C. § 501(c)(3) (as amended, 1976) contains the following list of exempt organizations:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any any political campaign on behalf of any candidate for public office.

5142 (D.D.C. May 23, 1975). It observed that allegations like those raised by plaintiffs would necessitate "careful consideration of the particular facts and circumstances of each case." Unwilling to embark upon such an enterprise, the court declared that its jurisdiction could "not be invoked to undertake continuing supervision of IRS's administration of the Internal Revenue Code."

The District Court's reluctance to become embroiled, at the instance of taxpayers not directly involved, in the intricacies of tax law enforcement is both understandable and far from irrational in terms of jurisictional principles. However, we believe that, looking to the Supreme Court's opinion in *Eastern Kentucky*, dismissal of appellants' action should be accomplished by resolution of the preliminary question of standing. We conclude that appellants have failed to demonstrate any actual injury resulting from appellees' administration, with respect to third parties, of the statutory provisions governing tax-exempt organizations. We find that appellants here, like the complainants in *Eastern Kentucky*, "have failed to carry [the] burden" of establishing "that, in fact, the asserted injury was the consequence of defendants' actions, or that prospective relief will remove the harm." 426 U.S. at 45, quoting *Warth v. Seldin*, 422 U.S. 490, 505 (1975).

II

Appellants' basic grievance may be simply stated. Private travel agents earn their livelihood, primarily on a commission basis, through the sale of transportation and travel-related services in both domestic and foreign markets. One especially common function performed by travel agents is the arrangement of so-called tour packages, consisting of transportation, accommodations, meals, and a variety of other features. Such packages are sold together

at one price, a portion of which the agent retains as a commission.

Appellants allege that, in recent years, a number of tax-exempt organizations, including the AJC, have become increasingly involved in preparing tour packages and offering such packages to their members. Appellants further allege that the tax-exempt status of these organizations has enabled them to sell tour packages at prices lower than those which private travel agents must charge in order to earn a reasonable profit. Thus, so it is said, the AJC and other unspecified organizations have improperly used their tax exemptions to obtain an unfair competitive advantage in the sale of tour packages.

Operation of an extensive travel program is, in appellants' view, substantially unrelated to the religious, charitable, scientific, or educational purposes which justify many § 501(c)(3) exemptions, including that enjoyed by the AJC. Consequently, appellants urge that income from such a travel program should be subjected to the same tax treatment accorded to income earned by ordinary ASTA members. Somewhat less vigorously, appellants maintain that if the § 501(c)(3) organizations at issue conduct travel businesses of significant size, then those organizations are no longer operated "exclusively" for religious, charitable, scientific, or educational purposes, and thereby forfeit their § 501(c)(3) exemptions.

We do not reach the merits, because we believe appellants have not alleged any judicially cognizable "injury in fact," and thus have failed to establish their standing to bring this suit. "Injury in fact" has long been regarded as the foremost standing prerequisite, and the only one of constitutional dimension. *See, e.g., United States v. SCRAP*, 412 U.S. 669, 686-89 & n. 14 (1973); *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972); and *Flast v. Cohen*, 392 U.S. 83, 99-101 (1968). Under Article III of the Constitution, federal courts are limited to

the adjudication of cases and controversies. In order to guarantee the adversarial litigation posture demanded by this constitutional language, plaintiffs seeking to invoke federal court jurisdiction have been required to demonstrate that they have suffered some actual injury attributable to defendants.

Here, appellants claim to have been injured by appellees' improper administration of the Internal Revenue Code, and seek injunctive relief. However, appellants have not indicated with sufficient specificity either the manner in which their alleged injury occurred or the nature of that injury. Appellants point to no prospective customers who spurned the services of ASTA members because of appellees' allegedly inequitable tax treatment of § 501(c)(3) organizations. Nor do appellants identify tour package purchasers who in fact patronized the AJC or some other tax-exempt organization, but who might legitimately be expected to do business with a private travel agent in the event appellees enforced the relevant tax code provisions according to appellants' recommendations. Instead, appellants complain in more abstract terms, alleging injury arising from appellees' creation of an unfair competitive atmosphere, and seeking relief in the form of the more congenial competitive environment which would supposedly result from proper tax enforcement policy. We regard this sort of injury claim as too speculative to support standing under the circumstances presented here.

We conceive that this disposition is not only sustained, but also largely mandated, by *Eastern Kentucky*. In that case, several indigents and organizations composed of indigents attacked a 1969 Revenue Ruling which revised the criteria under which non-profit hospitals might qualify for tax-exempt status as charitable institutions. In particular, the challenged ruling eliminated the requirement contained in a 1956 ruling to the effect that a non-profit hospital desirous of charitable classification "must

be operated to the extent of its financial ability for those not able to pay for the services rendered." Deletion of this language, argued the *Eastern Kentucky* plaintiffs, was directly responsible for several refusals by tax-exempt hospitals to provide needed services to individuals unable to pay a deposit or advance fee. Plaintiffs further alleged that similar refusals could be expected in the future if the offending Revenue Ruling was not changed.

As indicated above, the Supreme Court held that "[s]peculative inferences are necessary to connect [plaintiffs'] injury to the challenged actions . . .," and "[m]oreover, the complaint suggests no substantial likelihood that victory in this suit would result" in receipt of the hospital treatment desired. 426 U.S. at 45-46. The Court explained its conclusion by commenting upon what it perceived as the tenuous connection between the injury suffered and the relief sought by plaintiffs:

> [I]t does not follow . . . that the denial of access to hospital services in fact results from petitioners' new Ruling, or that a court-ordered return by petitioners to their previous policy would result in these respondents' receiving the hospital services they desire. It is purely speculative whether the denials of service specified in the complaint fairly can be traced to petitioners' "encouragement" or instead result from decisions made by the hospitals without regard to the tax implications.
>
> It is equally speculative whether the desired exercise of the court's remedial powers in this suit would result in the availability to respondents of such services. So far as the complaint sheds light, it is just as plausible that the hospitals to which respondents may apply for service would elect to forego favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services.[2]

Id. at 42-43.

[2] Justice Powell's opinion for the Court made clear that the finding of a standing deficiency in *Eastern Kentucky* rested upon a constitutional foundation.

> [W]hen a plaintiff's standing is brought into issue the relevant inquiry is whether . . . the plaintiff has shown an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation.
>
> * * * *
>
> The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement.
>
> * * * *
>
> The standing question in this suit therefore turns upon whether any individual respondent has established an actual injury, or whether the respondent organizations have established actual injury to any of their indigent members.
>
> * * * *
>
> [T]he "case or controversy" limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant....

Id. at 38-41 (footnotes omitted).

In a recent case decided by another panel of this court, inquiries relating to causation and redressability of an alleged injury are characterized as "prudential limitations." Tax Analysts and Advocates v. Blumenthal, No. 75-1304, slip op. at 11-12 (D.C. Cir. June 15, 1977); and *see also* Harrington v. Bush, No. 75-1862, slip op. at 28 n. 68 (D.C. Cir. Feb. 18, 1977), where such inquiries are portrayed as being separate and apart from the "constitutional threshold of injury-in-fact." The implication of these statements is that, although

ASTA's complaint in the appeal before us reveals inadequacies closely comparable to those which afflicted the pleadings filed by the indigents and indigent organizations in *Eastern Kentucky*. Appellants here must rely solely on speculation in their attempt to assert that their business or profits would improve in the event that appellees began to tax the travel-related income of § 501(c)(3) organizations. Appellants have not demonstrated that they would reap any tangible benefit if the court were to order the relief sought.

As appellees argue in their supplemental memorandum, the lower cost of the tour packages offered by the AJC and other tax-exempt organizations may well be attributable at least in significant part to the use of volunteer labor or the willingness to accept lower profits than would commercial travel agents. Moreover, even if appellants were to prevail in this suit, members of § 501(c)(3) organizations might for a variety of reasons continue to prefer the travel programs operated by their own organizations. Alternately, such organizations might shift to tour packages whose religious or educational orientation would be more readily apparent. A third possibility is that travel by members of § 501(c)(3) organizations would simply decline.

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considerations of causation or redressability may conceivably operate to deprive particular plaintiffs of standing, such factors can in no event rise to the level of constitutional significance. Justice Powell's words in *Eastern Kentucky*, especially the passages quoted above, are at odds with this approach. Causation and redressability, far from being prudential matters to be evaluated *seriatim* only after constitutional standing has been established, are part and parcel of the "injury in fact" requirement arising from the "case or controversy" language in Article III. Causation and redressability thus represent not additional independent standing hurdles which prospective litigants must clear, but rather identifiable aspects of the "injury in fact" test which has long been recognized as the primary standing criterion in the federal courts.

If any of these consequences, or some combination of them, ensued from a decision favorable to appellants, private travel agents would enjoy no gain whatever from their successful litigation. This is precisely the sort of situation in which the Supreme Court failed to find standing in *Eastern Kentucky*.[3]

By emphasizing their asserted competitor status, appellants seek to distinguish *Eastern Kentucky*. Appellants contend that, as competitors of the AJC and certain other § 501(c)(3) organizations, they are entitled to protest tax treatment of such organizations in federal court.[4]

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[3] Although Justice Stewart's concurring statement in *Eastern Kentucky* dramatically denotes the special problems attendant upon the establishment of standing in the tax cases, under the circumstances of this case we find, as did the *Eastern Kentucky* majority, no need to reach "the question of whether a third party ever may challenge IRS treatment of another." 426 U.S. at 37. The conventional "injury in fact" prerequisite was simply not met by appellants in the record before us.

[4] Appellants also rely on their competitor status to establish that they are within the "zone of interests to be protected or regulated by" the relevant Internal Revenue Code provisions. The so-called "zone of interests" test stems from the Supreme Court's companion opinions in Association of Data Processing Organizations, Inc. v. Camp, 397 U.S. 150, 153 (1970) and Barlow v. Collins, 397 U.S. 159, 164-65 (1970). As the Court observed in *Eastern Kentucky*, the "zone of interests" test presents "a second, nonconstitutional standing requirement." 426 U.S. at 39 n.19. In an effort to demonstrate that the "unrelated business" concept was incorporated into the Code in order to protect competitors of tax-exempt organizations, appellants point to both the legislative history of I.R.C. § 513 and the regulations promulgated regarding that section. *See, e.g.*, H.R. REP. No. 2319, 81st Cong., 2d Sess. 36 (1950); S. REP. No. 2375, 81st Cong., 2d Sess. 27-31 (1950); and 26 C.F.R. § 1.513-1(b) (1976). Given our disposition of this case under the "injury in fact" rubric, we need not address appellants' "zone of interests" argument.

For support of their position, appellants rely heavily on *Association of Data Processing Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). In that case, the Court held that private competitors had standing to challenge a ruling by the Comptroller of the Currency which allowed national banks to provide data processing services to other banks and bank customers. Appellants emphasize that the Supreme Court has, in its *Eastern Kentucky* opinion, recently reaffirmed the vitality of the *Data Processing* decision. *See* 426 U.S. at 45 n. 25.

Our response is threefold. First, the rather cryptic phrasing of *Data Processing* does not clearly define the contours of competitor standing as conceived by the Supreme Court. The opinion by Justice Douglas for the Court provides little guidance as to the precise nature of the requirements which must be satisfied before competitor standing can be sustained.[5]

Secondly, and more significantly, *Data Processing* was not a tax case. Whatever may be the impact of competitor standing when ordinary administrative action is

[5] Two examples may be cited. The first involves the identity of the parties who must be sued by a litigant alleging competitor standing. In *Data Processing*, one of the respondents was American National Bank & Trust Company, a national bank which was offering data processing services pursuant to the controverted ruling by the Comptroller of the Currency. Justice Douglas's opinion does not disclose whether a successful claim of competitor standing necessitates naming one or more specific competitors as party oponents. Here, only the Secretary of the Treasury and the Commissioner of Internal Revenue were named as defendants. No organizations holding § 501(c)(3) tax exemptions were made parties. We note that in *Eastern Kentucky*, Justice Powell stressed the fact that no tax-exempt hospital was a defendant. *See* 426 U.S. at 41. Also omitted from the *Data Processing* opinion was all discussion of the chain of causation connecting the challenged administrative action to the injury allegedly suffered by competitors of regulated enterprises. That chain was patently much shorter and more direct in *Data Processing* than it is in this case.

at issue, we do not believe that *Data Processing* should be read to endorse standing for any private business, individual or corporate, which wishes to contest the tax treatment of a competitor.

Finally, § 501(c)(3) organizations occupy a different posture with respect to the sale of tour packages than did the national banks with respect to the provision of data processing services. Here, the AJC and other such groups will clearly remain free to pursue their travel businesses, however the tax status is finally resolved. By contrast, in *Data Processing*, if the Comptroller of the Currency's ruling had been overturned on judicial review, the offering of data processing services by national banks would have been *illegal*, and petitioners undoubtedly would have faced no further competition from that source, absent statutory revision.

For all these reasons, we do not believe that the *Data Processing* decision controls the standing issue in the present litigation.[6] Since we are convinced that the *Eastern Kentucky* analysis of standing is the one we are

[6] In *Tax Analysts, supra* note 2, a panel of this court recently found economic injury in fact, adequate to meet the Article III test of standing. Appellant in that case was the owner of a small domestic oil well. Rightly or wrongly, he characterized himself as a competitor of the major oil companies producing and importing oil from abroad. He claimed to have suffered economic harm because the IRS had acquiesced in the tax credit treatment of certain sums paid by large oil companies to foreign governments. Appellant in *Tax Analysts* asserted that these sums represented foreign excise taxes or royalties, not foreign income taxes, and that therefore, they should be treated as deductible business expenses, not tax credits. Having found such allegations sufficient to establish injury in fact, the *Tax Analysts* panel then addressed the prudential "zone of interests" test, and found that the court house door was barred on that score. By reason of this latter finding, the panel did not think it necessary to pursue what it termed the "two additional prudential limitations relating to causation and redressability of the grievance. . . ." Slip op. at 11-12 (footnote omitted); and see note 2 *supra*.

bound to apply in this case, and that under it appellants lacked standing to maintain this suit, the judgment of dismissal is affirmed.[7]

It is so ordered.

[7] The dissent observes of the foregoing opinion that "it constructs a constitutional standard of injury in fact that would effectively preclude taxpayer suits claiming competitive injury." The word "constructs" is hardly an apt characterization of the majority's effort, in purpose and effect, to follow as faithfully as possible the Supreme Court's disposition of *Eastern Kentucky*—the case which, prior to that disposition, all members of the panel appeared to regard as almost certainly controlling.

It would thus seem that the dissent's quarrel is essentially with the approach taken by the Supreme Court majority in *Eastern Kentucky*, and not with anything the panel majority has itself contrived. The dissent asserts that that approach is an impolitic and unwarrantable return to the rigors of common law pleading, and one that is incompatible with a rational determination of assessibility to the federal courts. Although in this instance the dissent purports to see distinctions which enable it to assert that *Eastern Kentucky* was rightly denied by the Supreme Court, it is manifest that this is not an undertaking it finds either necessary or congenial. As is usually the case in such circumstances, the differentiations here made in terms of economic probabilities are less than conclusive.

It is no disrespect to the Supreme Court to say that the concept of standing appears to be undergoing development. *Warth v. Seldin, supra*, and *Eastern Kentucky*, with their new emphasis upon causation and redressibility, indicate that at least a majority of the Court is no longer content with a constitutional concept of injury in fact limited to an assurance that the interest asserted will guarantee an effective adversarial presentation. Causation and redressability have now explicitly been comprehended within that concept. Whether this is only a tightening up of pleading requirements, or whether it is a way station on the road to a holding of nonjusticiability in certain classes of litigation, neither we nor the dissent can say. In such circumstances it is surely the function of an intermediate appellate court to be guided by standing requirements as they are currently articulated by the Supreme Court in closely comparable contexts.

BAZELON, *Chief Judge, dissenting* in No. 75-1304, *Tax Analysts and Advocates v. Blumenthal*, and in No. 75-1782, *American Society of Travel Agents, Inc. v. Blumenthal*: Two panels of the Court hold, for partially inconsistent reasons, that a taxpayer suffering competitive injury lacks standing to challenge tax rulings applicable to a third party. Because I disagree with the reasoning of both panels, I must respectfully dissent.

I have decided to write a common dissent on both decisions because I believe that, although each panel develops a different aspect of standing doctrine, both are in fact responding to a common but implicit apprehension of taxpayer standing.[1] I share that apprehension. The spectre of the Internal Revenue Service (IRS) defending a multiplicity of suits challenging the tax liabilities of third parties is not a happy one.[2] Taxes and courts are a

[1] The majority opinion in No. 75-1782, American Society of Travel Agents, Inc. v. Blumenthal, states with admirable candor that the case "presents a threshold issue of standing to sue reminiscent of Justice Stewart's observation, concurring in *Simon* v. *Eastern Kentucky Welfare Rights Organization, et al.*, 426 U.S. 26, 46 (1975), that he could not 'imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else.'" Maj. op. at 2. Although the opinion does not directly address this question, it constructs a constitutional standard of injury in fact that would effectively preclude taxpayer suits claiming competitive injury. The majority opinion in No. 75-1304, Tax Analysts and Advocates v. Blumenthal, explicitly declines to address the issue of "whether a third party ever made challenge IRS treatment of another." Maj. op. at 27 n.90. However, the discussion of the "zone of interests" test in the opinion seems designed, "as a prudential matter," *id.* at 26, to eliminate such challenges from a federal forum.

[2] On the other hand, it must be recognized that the Code is a statutory system designed delicately to balance the relationships among economic entities. To permit tax liability to be challenged only by the taxpayer himself is in effect to permit

volatile political combination; our jurisdiction in this area has for that reason been circumscribed by statute.[3] But whether a federal forum should be closed to such suits is a profound and complicated issue, and at base one that should be decided by Congress. At present Congress has decided that we do have jurisdiction to hear cases such as those presently before us,[4] and we are obligated to exercise this statutory jurisdiction.

the IRS virtually unfettered discretion in adjusting these economic interrelationships. The spectre of such unreviewable discretion, especially when, as is alleged in these two cases, it is exercised in contradiction to the commands of Congress, is also discomforting.

[3] 26 U.S.C. § 7421(a), for example, provides that, except in certain exceptional circumstances, "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." The purpose of the statute is "to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require that the legal right to the disputed sums be determined in a suit for refund." Enochs v. Williams Packing and Navigation Co., Inc., 370 U.S. 1, 7 (1962). Our jurisdiction is similarly limited in the area of federal taxes by the Declaratory Judgment Act, which authorizes courts of the United States to issue declaratory judgments "except with respect to Federal taxes . . . ." 28 U.S.C. § 2201.

[4] In Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 36-37 (1976), the Supreme Court specifically left open the question of whether statutory or immunity bars would ever permit a third party to "challenge IRS treatment of another." This court has held, however, that since 26 U.S.C. § 7421(a) only forbids suits instigated "for the purpose of *restraining* the assessment or collection of any tax," (emphasis added), it does not bar suits seeking to compel the *collection* of taxes. Eastern Kentucky Welfare Rights Org. v. Simon, 506 F.2d 1278, 1284 (D.C. Cir. 1974), *vacated on other grounds*, 426 U.S. 26 (1976). We have also held that the scope of the prohibition in the Declaratory Judgment Act, 28 U.S.C. § 2201, is "coterminous" with that of 26 U.S.C. § 7421(a), *id.* at 1284-85, and hence that in suits seeking to compel the collection of taxes we are authorized to provide declaratory relief.

Appellants have alleged circumstances that would have justified standing had they been seeking review of an ordinary administrative ruling. What concerns me most deeply about these decisions is that both deny appellants standing not on principles specifically applicable to taxpayers suits, but on the basis of general doctrines of the law of standing. The consequence is that general standing law is distorted to accommodate the purpose of shielding the IRS.

In No. 75-1782, *American Society of Travel Agents, Inc. v. Blumenthal*, appellants, numerous commercial travel agencies and the American Society of Travel Agents (ASTA), a non-profit corporation organized to represent the professional interests of travel agents, allege that certain organizations tax exempt under 26 U.S.C. § 501(c)(3),[5] and the American Jewish Congress (AJC) in particular, actually package and offer to the public large scale commercial travel programs. Appellants argue that such commercial activities are illegal in corporations exempt under § 501(c)(3),[6] and that

[5] 26 U.S.C. § 501(c)(3) exempts from taxation

> [c]orporations and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

[6] Complaint ¶¶ 22, 23.

appellants are injured by this illegality since tax-exempt organizations can offer travel programs more cheaply than tax-paying organizations.[7] They ask that the AJC and similar organizations be deprived of their tax-exempt status, or, in the alternative, that income from these commercial programs be taxed under 26 U.S.C. § 511 (a).[8] The majority holds that appellants fail to meet the Article III requirement of injury in fact. Because I believe that appellants have alleged ordinary competitive injury sufficient to meet the standards set out in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), I dissent from this holding.

In No. 75-1304, *Tax Analysts and Advocates v. Blumenthal*, the majority denies standing to appellant Tax Analysts and Advocates (TAA), a non-profit corporation organized for the purpose of promoting tax reform, and to appellant Thomas Field, a United States taxpayer and owner of the entire working interest in a currently producing oil well in Pennsylvania. Appellants seek to challenge published[9] and private[10] rulings by the IRS that taxes imposed by Saudi Arabia, Libya, Iran, Kuwait and Venezuela are "income" taxes, and thus can be credited against U.S. tax liability under 26 U.S.C.

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[7] *Id.* at ¶ 24.

[8] 26 U.S.C. § 511(a) imposes on corporations subject to § 501(c)(3) a tax on "unrelated business taxable income." "Unrelated business" is defined in § 513(a) to mean

> any trade or business the conduct of which is not substantially related . . . to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under section 501 . . . .

[9] *See* Revenue Ruling 55-296, 1955-1 Cum. Bull. 386; Revenue Ruling 68-552, 1968-2 Cum. Bull. 306.

[10] *See* Amended complaint ¶ 10, Joint Appendix (JA) at 41.

§ 901(b).[11] Appellants allege that these taxes are in fact either royalties or "excise, severance, or similar taxes not creditable under Section 901(b)."[12]

Appellant Field and appellant TAA as a representative of its tax-paying members, claim injury as taxpayers. They allege that the illegal IRS rulings cost the U.S. Treasury approximately $3,000,000,000 in 1974, and argue that this loss causes them to pay higher federal income taxes.[13] Appellant Field, in addition, claims that he is injured as a competitor of those oil companies who benefit from the illegal IRS rulings. Field alleges that since the prices charged by these companies for imported oil largely determine the market price for the uncontrolled crude oil of domestic independent producers, he receives a lower price for his oil than would be the case if such companies could only deduct these foreign taxes from their gross income rather than illegally credit them.[14] Moreover, since domestic producers can only deduct the royalties they pay to the land owners of their oil wells,[15] Field claims that investment in foreign oil production is relatively more profitable and attractive.

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[11] 26 U.S.C. § 901(b) permits a U.S. citizen or domestic corporation to receive a tax credit for "the amount of any income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country . . . ."

[12] Amended Complaint ¶ 14, JA at 42.

[13] Amended Complaint at ¶¶ 14, 20, 21, JA at 42, 44.

[14] Amended Complaint at ¶ 18, JA at 43-44.

[15] Appellant Field pays a royalty of one-eighth of the proceeds of all oil produced from his well to the owners of the land on which the well is located. These royalties are expected to amount to $46.32 per year for the next five years. See the findings of the District Court, Tax Analysts and Advocates v. Simon, 390 F. Supp. 927, 929-30 (D.C.C. 1975).

Field alleges that the IRS rulings thus "depress the value of his operating interest in a domestic oil well." [16]

The majority denies standing to both Field and the TAA in their capacities as mere taxpayers.[17] Because as taxpayers appellants have not met the "nexus" text of *Flast v. Cohen*, 392 U.S. 83, 102-03 (1968),[18] and have alleged only a "generalized grievance" the impact of which "is plainly undifferentiated and 'common to all members of the public . . .' *Ex parte Lévitt*, 302 U.S. 633, 634 (1937)," [19] I concur in that holding.[20]

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[16] Amended Complaint ¶ 19, JA at 44.

[17] The majority affirms the District Court's finding of no injury in fact and adopts its reasoning at 390 F. Supp. 932-38. Maj. op. at 4 n.10.

[18] *Flast* focused on the "logical nexus between the status asserted and the claim sought to be adjudicated." The decision held that there were two aspects to the nexus required to sustain taxpayer's standing. "First, the taxpayer must establish a logical link between [federal taxpayer] status and the type of legislative enactment attacked . . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement alleged." 392 U.S. at 102.

[19] United States v. Richardson, 418 U.S. 166, 176-77 (1974).

[20] I do not agree, however, with the majority's conclusion that appellants have suffered no injury in fact. Maj. op. at 4 n.10. A generalized grievance is a grievance nonetheless. Since injury in fact is a constitutional prerequisite of standing, the taxpayer in *Flast* must have suffered such an injury. Nevertheless, the Supreme Court has held that as a prudential matter, a grievance "shared in substantially equal measure by all or a large class of citizens" should normally not "warrant exercise of jurisdiction." Warth v. Seldin, 422 U.S. 490, 499 (1975). Congress can, of course, "either expressly or by clear implication" override this prudential consideration. *Id.* at 501. Appellants, however, have pointed to no statute in which Congress has either expressly or implicitly authorized a right of action for generalized taxpayer grievances.

The majority also denies appellant Field standing. It concedes the Field has suffered injury in fact sufficient to meet Article III standards,[21] yet it finds that Field has failed the second of the standing tests enunciated in *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). It concludes that the interests Field seeks to protect are not "arguably within the zone of interests to be protected or regulated" by § 901(b). In reaching this conclusion the majority is forced to construe the "zone of interests" test in an unsupportable manner, capable of causing unforeseeable mischief in other areas of standing law. I dissent both from the majority's conclusion and from its construction.

I. Injury in Fact

Article III of the Constitution limits federal court jurisdiction to actual cases or controversies. The question of standing "focuses on the party seeking to get his complaint before a federal court," *Flast v. Cohen*, 392 U.S. 83, 99 (1968), in order to determine if he "has made out a 'case or controversy' between himself and the defendant within the meaning of Act. III." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Two aspects of the case and controversy standard are important for the law of standing. The first is that cases and controversies must be adversary; that is, they must be disputes over actual or threatened injuries. Thus standing exists "only when the plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal action . . . .' *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 (1973)." *Id.* at 499. Second, cases and controversies must "be presented in a form historically viewed as capable of judicial resolution." *Flast v. Cohen*, 392 U.S. 83, 101 (1968). Thus federal courts cannot, consistent with Article III, issue advisory opinions. *Id.* at 96-97.

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[21] Maj. op. at 12.

Standing requires that a plaintiff demonstrate "an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38 (1976).[22] *Eastern Kentucky* makes clear that an injury capable of being redressed is one that can fairly "be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Id.* at 41-42.[23]

It is, of course, settled law that in appropriate circumstances competitive injury constitutes sufficient injury in fact to fulfill Article III requirements.[24] This is acknowledged by the opinion in *Tax Analysts.*[25] In that case appellant Field owns the entire working interest in a Pennsylvania oil well. The well produces three barrels of crude oil per month at a price of $10.28 per barrel. Field's anticipated profits before taxes are approximately $203.76 per year.[26] He complains of economic injury because allegedly illegal IRS rulings have decreased the value of his well and the price he receives for his crude oil.

[22] *See* United States v. Evans, 213 U.S. 297 (1909).

[23] Like the majority in *Travel Agents*, I disagree with the observation in *Tax Analysts* that "causation" and "redressability" are merely "prudential limitations" on standing. See *Tax Analysts* at 11-12; *Travel Agents* at 8 n.2.

[24] Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 223 (1974); Sierra Club v. Morton, 405 U.S. 727, 736-37 & n.11 (1972); Investment Co. Institute v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

[25] Maj. op. at 12.

[26] 390 F. Supp. at 929.

At first blush it is tempting to hold such economic injury, if it exists, to be *de minimis*. However, it is apparent that there can be no principled justification for such a holding, and the Supreme Court has held that any identifiable trifle of harm is enough to establish standing. *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973). It is also tempting to hold that Field's injury is too speculative. While it is true that we cannot know with absolute certainty whether the elimination of the allegedly illegal IRS ruling would redress Field's competitive injury, he has set forth a cogent economic analysis that this would be the case. To require Field to allege facts that would prove the laws of economics would be ungainly, wasteful, and inconsistent with the philosophy of pleading of the Federal Rules of Civil Procedure. The modern conception of "notice pleading"[27] does "not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Requiring Field to allege all of the facts supportive of the chain of causation upon which his allegation of injury rests would return us to the unpredictable and fact-laden system of code pleading.[28]

Recognizing all this, the majority in *Tax Analysts* holds that Field "has suffered injury in fact in his capacity as a

[27] Wright and Miller object to the term "notice pleading" and suggest instead "modern pleading" or "simplified pleading." WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 1202 (1969).

[28] *See id.*; 2A MOORE'S FEDERAL PRACTICE ¶¶ 8.12-8.13 (1975); CLARK, CODE PLEADING § 38 (1947); Skinner, *Pre-Trial and Discovery Under the Alabama Rules of Civil Procedure*, 9 ALA. L. REV. 202, 203-05 (1957).

competitor."[29] I concur in this holding. And, so far as I can see, the competitive injury that ASTA and the other appellants in *Travel Agents* claim to have suffered is virtually indistinguishable. Yet the majority in that case holds that appellants have no standing because they have failed to demonstrate "any judicially cognizable 'injury in fact.'"[30]

The majority in *Travel Agents* holds, first, that the very existence of appellants' competitive injury is "too speculative to support standing" since they do not allege specific customers who would be gained if the AJC and similar organizations were to lose their tax-exempt status.[31] Second, the majority concludes that "[a]ppellants have not demonstrated that they would reap any tangible benefit if the court were to order the relief sought."[32] If the tax-exempt status of the AJC or other tax-exempt organizations were eliminated, these organizations might still maintain lower prices because of "volunteer labor or the willingness to accept lower profits"; or members of these tax-exempt organizations might still prefer the travel programs of their own organizations even if more expensive; or such members might simply decide not to travel at all.[33]

With all due respect, such reasoning reveals that it is the majority, not the appellants, who is engaging in speculation. The economic basis of appellants' injury is straightforward, far more compelling even than that alleged by appellant Field in *Tax Analysts*. Appellants allege that because of the AJC's

[29] Maj. op. at 12. The majority terms the government's arguments to the contrary "frivolous." *Id.* at 12 n.45.

[30] Maj. op. at 5.

[31] *Id.* at 6.

[32] *Id.* at 9.

[33] *Id.*

> tax-exempt status and the other privileges which flow from it, such as reduced-rate postage, the [AJC] and others are able to offer lower-cost travel programs than plaintiffs and other tax-paying travel agents. Plaintiffs allege and believe that numerous persons who would otherwise use plaintiffs' services and the services of other tax-paying travel agents are instead induced by the extensive mail solicitations and lower costs and take business to tax-exempt organizations.[34]

It is true, of course, that all claims of competitive injury are to some extent speculative, since they are predicated on the independent decisions of third parties; *i.e.*, customers. However economics is the science of predicting these economic decisions, and it is the stuff of the most elementary economic texts that if two firms are offering a similar product for different prices, the firm offering the lower price will draw away customers from its competitor. For us to fly in the face of this learning and require a plaintiff to *allege in his complaint* the names of specific customers who would be led to alter their consumption patterns, would be to exalt form over substance and to take a long, unfortunate step backwards into what Professor Moore has termed "the morass" of code pleading.[35] I know of no case, nor has one been cited by the majority, in which such allegations have been adjudged a necessary element in a complaint of competitive injury.[36]

[34] Complaint ¶ 24.

[35] 2A Moore's Federal Practice ¶ 8.13 (1975). Stripped to its essentials, the majority's argument is that appellants have alleged conclusions rather than facts. However, under the philosophy of the Federal Rules, "it is immaterial whether a pleading states 'conclusions' or 'facts' as long as fair notice is given . . . ." *Id.*

[36] *See* Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940); Rental Housing Ass'n of Greater Lynn, Inc. v. Hills, 548 F.2d 388 (1st Cir. 1977); Concerned

The majority's reasoning, in fact, is flatly contradictory to *Investment Co. Institute v. Camp*, 401 U.S. 617 (1971). In that case plaintiffs complained of competitive injury because of an allegedly illegal regulation of the Comptroller of the Currency permitting national banks to establish and operate collective investment funds. The Supreme Court upheld the standing of the plaintiffs, *id.* at 620-21, even though their allegations of injury were no more specific that those of the appellants in this case. Plaintiffs alleged merely that they would

> suffer present and continuing serious and irreparable injury as a direct result of the illegal activity authorized by the Comptroller's challenged regulations and particularly as a result of the Bank's proposed illegal activity which was approved by the Comptroller under such regulations. This illegal activity

Residents of Buck Hill Falls v. Grant, 537 F.2d 29, 33 (3d Cir. 1976).

It is unclear to me exactly what facts the majority would require to be alleged. Surely an affidavit from a tour package purchaser swearing that *he would have patronized a commercial travel agency had its prices been competitive* would constitute the height of speculation. *See* American Trucking Ass'ns, Inc. v. United States, 364 U.S. 1 (1960), in which the Court concluded that trucking companies had standing under § 205(g) of the Interstate Commerce Act and § 10(a) of the Administrative Procedure Act to challenge the ICC's granting of a permit to a competitor to perform transportation services for appellee General Motors Corporation, *despite GM's statement in court that it would not do business with appellants.* The Court stated, "And surely the statement by General Motors that it would not in any event give the business to any appellant cannot deprive appellants of standing. The interests of these independents cannot be placed in the hands of a shipper to do with as it sees fit through predictions as to whom its business will or will not go. The decision we believe to be controlling is . . . *Alton R. Co.* v. *United States*, 315 U.S. 15, where the Court confirmed the standing of a railroad to contest the award of a certificate to a competing trucker." Id. at 17-18.

> will subject the Institute's mutual fund members to illegal competition, will deprive them of legitimate business, and will dilute, divert, and withdraw a substantial portion of the potential market for securities in mutual funds to the substantial and irreparable injury of such plaintiffs and the shareholders in such funds. This illegal activity will also subject the Institute's investment adviser and underwriter members, including the additional plaintiffs, to illegal competition and to loss of opportunities for profit in their trade and will dilute, divert and withdraw a substantial portion of the potential market for their services to the irreparable injury of such plaintiffs.[37]

The Supreme Court did not, as does the majority in this case, require plaintiffs to allege in their complaint facts sufficient to refute every possible anomaly of the marketplace such as the existence of voluntary labor or ideologically committed consumers. The Court assumed that the marketplace would function in a normal, predictable fashion,[38] for to assume otherwise would be to foreclose the

[37] Complaint ¶ 18. *Investment Co. Institute v. Camp* was a consolidation of two cases, No. 61, Investment Co. Institute v. Camp, and No. 59, National Ass'n of Securities Dealers, Inc. v. SEC. The complaint quoted in text is from No. 61, the case in which the Supreme Court specifically upheld standing.

Just last year, this court accepted jurisdiction of a case in which plaintiffs had obtained standing on the basis of a complaint reading very much like the complaint in the instant case. Plaintiffs alleged competitive injury, yet named no specific customers who had been lost. This court not only accepted plaintiffs' standing, but also upheld the district court injunction because it was necessary to protect these plaintiffs from "further economic and competitive injury." Independent Bankers Ass'n v. Smith, 534 F.2d 921, 952 (D.C.Cir.), *cert. denied sub nom.* Bloom v. Independent Bankers Ass'n, 429 U.S. 862 (1976); Complaint ¶ 31.

[38] The assumption is a common one. For example, in cases under the Robinson-Patman Act, 15 U.S.C. § 13, "competitive injury may be inferred when one set of customers buys at sub-

very possibility of ever satisfactorily alleging a competitive injury. As the majority's opinion demonstrates, one might conjecture an indefinite number of such anomalies, some more plausible than others. For every anomaly invented, the plaintiffs' claim can be made to appear more "speculative." Standing under such access rules would virtually depend upon the imagination of the reviewing judge.

The majority argues that its conclusion is required by *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976). I disagree. In *Eastern Kentucky*, plaintiffs alleged that a 1969 Revenue Ruling has "encouraged" hospitals to deny services to indigents.[39] Under the tax code, benefactors of institutions qualifying as "charitable" under § 501(c)(3) can deduct the amount of their donations. Plaintiffs alleged that the new Revenue Ruling, by permitting hospitals that offered only emergency room services to indigents to qualify for § 501(c)(3) status, "caused" the refusal of various hospitals to admit indigent plaintiffs. The premise of the plaintiffs' argument was that hospitals were so dependent upon deductible donations that they would perform whatever services were necessary to qualify for § 501(c)(3) status. That premise, as a logical or economic prediction, was clearly false: there

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stantially lower prices than other customers." Hanson v. Pittsburgh Plate Glass Industries, Inc., 482 F.2d 220, 227 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974). *See* FTC v. Morton Salt Co., 334 U.S. 37, 46-47 (1948): "Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay." The injury, of course, may be inferred because merchants faced with higher prices and therefore higher costs must in turn charge their customers higher prices and thereby lose business and suffer competitive injury. This is precisely the chain of economic reasoning relied upon by appellants in *Travel Agents*.

[39] 426 U.S. at 42.

was no way of knowing in advance whether the increased income from charitable contributions would exceed the increased costs of providing additional services. The result, as the Supreme Court observed, would "vary from hospital to hospital." *Id.* at 43. Plaintiffs had thus failed to allege facts sufficient to predict whether the change in the Revenue Ruling would affect the behavior of those particular hospitals that had refused to admit the plaintiffs.

Eastern Kentucky applies to fundamentally different circumstances than those presented in *Travel Agents*. The injury alleged by ASTA and the other appellant travel agencies does not depend upon the discreet decisions of particular institutions or specific customers. Appellants allege a competitive injury, stemming from a systematic distortion of the marketplace. They claim that, because of illegal IRS rulings, their competitors pay no taxes and therefore have lower costs and charge lower prices. There is nothing hypothetical about this allegation: if we grant the relief appellants seek, the costs of their competitors would necessarily increase. The ultimate injury alleged is a loss of customers, and there is, of course, an implicit prediction in appellants' case that customers will, on the whole, tend to buy similar items at the lowest possible price. The majority can refer to this injury as "abstract" and to this prediction as "speculative," but these are abstractions and speculations that every businessman must confront every day.[40] The majority's corrosive skepti-

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[40] Article III, of course, does not require *absolute certainty* that prospective relief will redress the alleged harm. *See* Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 44-45 (1976); City of Hartford v. Towns of Glastonbury, West Hartford, and East Hartford, Nos. 76-6049, -6050, -6059, slip op. at 1098 (2d Cir. 23 December 1976). This court, for example, has held that an unsuccessful bidder for a government contract has standing to challenge the validity of the awarding of the contract, even though the plaintiff has

cism would altogether eliminate competitive injury as a grounds for standing.[41] That would in fact be contrary to the teaching of *Eastern Kentucky*, since the decision explicitly reaffirmed *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150 (1970). Standing was appropriate in *Data Processing*, the Court said, because in that case the complaint had "alleged injury that was directly traceable to the action of the defendant federal official, for it complained of injurious competition that would have been illegal without that action." 426 U.S. at 45 n.25.

"no right . . . *to have the contract awarded to it* in the event the district court finds illegality in the award . . . ." (Emphasis added.) Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 864 (D.C. Cir. 1970). *See* Cincinnati Electronics Corp. v. Kleppe, 509 F.2d 1080 (6th Cir. 1975); Hayes International Corp. v. McLucas, 509 F.2d 247 (5th Cir.), *cert. denied*, 423 U.S. 864 (1975); William F. Wilke, Inc. v. Department of Army, 485 F.2d 180 (4th Cir. 1973); Merriam v. Kunzig, 476 F.2d 1233 (3d Cir.), *cert. denied sub nom.* Gateway Center Corp. v. Merriam, 414 U.S. 911 (1973).

[41] I share, of course, the majority's concern "to follow as faithfully as possible" *Eastern Kentucky*. Maj. op. at 13 n.7. We differ in our reading of that case, not in our respect for the precedents of the Supreme Court. The majority seems to have taken from *Eastern Kentucky* the concepts of "causation," "redressability," and "speculation," without, in my view, adequate appreciation of the malleableness—not to say vagueness—of these ideas. They are the kind of standards that acquire meaningful content only in application to particular circumstances. *See* Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663, 681-88 (1977). The claim of competitive injury was not addressed in *Eastern Kentucky*, and the majority's result is therefore not required by that case. If this area of the law, confused because "undergoing development," maj. op. at 13 n.7, is to be clarified, it will not be through the abstract application of general principles, but through a detailed discussion of the pertinent differences and similarities. I cannot believe that this is an inappropriate function for "an intermediate appellate court." *Id.*

In *Travel Agents* appellants also allege "injurious competition" that is "directly traceable to the action of the defendant federal official." The majority attempts to distinguish *Data Processing* by arguing that the relief requested in that case was the total elimination of the allegedly illegal competition, whereas in *Travel Agents* "the AJC and other such groups will clearly remain free to pursue their travel businesses, however their tax status is finally resolved."[42] This distinction, however, goes only to the extent of the injury suffered, not to its speculative or hypothetical nature. And so long as appellants have alleged any "identifiable trifle" of an injury, they should be granted standing. *United States v. SCRAP*, 412 U.S. 669, 689 n.14 (1973); *Tax Analysts and Advocates v. Blumenthal*, No. 75-1304, slip op. at 12 (D.C. Cir. 15 June 1977). Because I believe that *Data Processing* controls this case, I would hold that appellants have alleged injury in fact sufficient to meet the prerequisites of Article III.

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[42] Maj. op. at 12. The majority offers two additional reasons for distinguishing *Data Processing*. The first is that the case did "not clearly define the contours of competitor standing as conceived by the Supreme Court." The majority states, for example, that it is unclear whether "a successful claim of competitor standing necessitates naming one or more specific competitors as party opponents." *Id.* at 11 n.5. But surely this doubt should be laid to rest by the complaint in case No. 61 of Investment Co. Institute v. Camp, 401 U.S. 617 (1971), *see* note 37 *supra*, in which, as in the instant case, only the relevant federal official was made a party opponent and no competitors were named defendants.

The majority also attempts to distinguish *Data Processing* on the grounds that it "was not a tax case." Maj. op. at 11. While I believe this rather cryptic distinction goes to the heart of the majority's holding, it cannot without further elaboration be the basis of a principled distinction. What is needed is a full discussion of the difference between challenges of the rulings of the IRS and challenges of the rulings of other administrative agencies.

II. ZONE OF INTERESTS

Data Processing announced two tests for standing: A petitioner must allege injury in fact, and he must allege that the "interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." 397 U.S. at 153. The majority in *Tax Analysts*, following a different approach from that in *Travel Agents*, finds that appellant Field has suffered injury in fact, but concludes that he must fail the zone test because he is not arguably within the zone of interests protected or regulated by the provisions of IRS § 901(b),[43] the foreign tax credit.

As the majority in *Tax Analysts* candidly admits,[44] the ambiguities and analytic deficiencies of the zone test have in recent years suffered scathing criticism.[45] In order to reach its conclusion, the majority is forced to undertake an extensive reevaluation of the purposes and operation of the zone test. In my opinion not only does the majority reach an incorrect conclusion in the instant case, but its analysis only further confuses an already unfortunately unsettled area of the law.

A. *Defining the Zone of Interests*

The majority begins with the premise that the zone test must be "based on discerned Congressional purpose."[46] It concludes that the function of the zone test is to allow

[43] *See* note 11 *supra*.

[44] Maj. op. at 13.

[45] *See, e.g.*, K.C. DAVIS, ADMINISTRATIVE LAW TREATISE (Supp. 1970) § 22.00-3; Scott, *Standing in the Supreme Court —A Functional Analysis*, 86 HARV. L. REV. 645, 664 n.88 (1973).

[46] Maj. op. at 16.

"courts to define those instances when it believes the exercise of its power at the instigation of the particular party is not congruent with the mandate of the legislative branch in a particular subject area."[47]

I agree with the majority's premise. The real question, however, is how "the mandate of the legislative branch" is to be determined. In some cases congressional intent will be manifest. In *Travel Agents*, for example, the legislative history of sections 511-513 of the Code[48] clearly indicates that Congress intended to eliminate the unfair competition that results when tax-exempt organizations compete with tax-paying enterprises. Both House and Senate Committee reports state that "[t]he problem at which the tax on unrelated business income is directed is primarily unfair competition." H. R. REP. No. 2319, 81st Cong., 2d Sess. 36 (1950); S. REP. No. 2375, 81st Cong., 2d Sess. 28 (1950).[49] There is no doubt, therefore, that appellants would have satisfied the zone test.

In other cases, however, the legislative mandate will be silent or ambiguous with respect to the interests of a "particular party." In such cases it is necessary to develop rules for the constructive interpretation of congressional purpose. Decisions of the Supreme Court that have enunciated and applied the zone test are the most authoritative source of such rules. These decisions indicate that congressional intent must be construed to include within the zone of interests to be protected or regulated

[47] *Id.* at 15.

[48] *See* notes 5 and 8 *supra*.

[49] Treasury regulations recognize that the primary purpose of the unrelated business income tax "was to eliminate a source of unfair competition by placing the unrelated business activities of certain exempt organizations upon the same tax basis as the non-exempt business endeavors with which they compete . . . ." 26 C.F.R. § 1.513-1(b).

by a statute those interests upon which the statute will have a readily forseeable impact.

In *Arnold Tours, Inc. v. Camp,* 400 U.S. 45 (1970), for example, plaintiff travel agents challenged as contrary to the Bank Service Corporation Act a ruling of the Comptroller of the Currency authorizing national banks to provide travel services for their customers. Plaintiffs themselves were clearly not the intended beneficiaries of the Act. There were unchallenged findings in the court below that the limitations on banking activity imposed by the Act "were for the purpose of insuring the stability, liquidity, and safety of the banks" and that Congress was unconcerned "with competitors in the businesses impliedly prohibited, much less in any particularity with travel agents." 408 F.2d 1147, 1151 (1st Cir. 1969). Nevertheless the Supreme Court concluded that the interests asserted by plaintiffs were arguably within the zone of interests protected by the Act. The *only* connection between plaintiffs' interests and the Act was that "[w]hen national banks begin to provide travel services for their customers, they compete with travel agents . . . ." 400 U.S. at 46.

Investment Co. Institute v. Camp, 401 U.S. 617 (1971), teaches a similar lesson. In that case plaintiff investment companies challenged a regulation of the Comptroller authorizing national banks to establish and operate collective investment funds. Plaintiffs alleged that the regulation violated provisions of the Glass-Steagall Banking Act. Despite unchallenged evidence that "neither the language of the pertinent provisions of the Glass-Steagall Act nor the legislative history evinces any congressional concern for the interests of the petitioners and others like them in freedom from competition," 401 U.S. at 640 (Harlan, J., dissenting),[50] the court held that plaintiffs satisfied

[50] The Court even appeared to concede this point. 401 U.S. at 634. *See* Scott, *supra* note 45, at 665-66.

the requirements of the zone test. Again, the readily forseeable impact of the statute on plaintiffs' interests was their only connection to the legislation.

These decisions, then, stand for the proposition that, in the absence of manifest congressional intent to the contrary, the zone of interests arguably protected or regulated by a statute should at a minimum include those interests upon which the statute has a readily foreseeable impact.[51] Plaintiffs asserting such interests should have standing under the zone test.

The majority, however, rejects this conclusion, arguing that "the concepts of *consequence* and *impact* are not the proper guideposts to define the relevant zone of interests."[52] The majority reasons that defining "the zone of interests as being the equivalent in every case of the 'zone of impact' or the 'zone of consequences' . . . would establish a standing doctrine based solely on the existence of harm to a party . . . ."[53] But this reasoning is clearly faulty: a statute's zone of *foreseeable* impact or consequences would not encompass every incidence of *actual* impact. And, more importantly, the majority's conclusion is flatly contradictory to the guidance of the Supreme Court.

I sense yet another, implicit reason underlying the majority's rejection of the liberal standards of *Arnold Tours* and *Investment Co. Institute.* Although the majority acknowledges that the zone test is meant to be

[51] This formulation is consistent with the only case I have found to give extensive consideration to this question, Cotovsky-Kaplan Physical Therapy Ass'n, Ltd. v. United States, 507 F.2d 1363, 1366-67 (7th Cir. 1975) (per Stevens, J.).

[52] Maj. op. at 25.

[53] *Id.* at 26.

"a quite generous standard," [54] it nevertheless argues that the test implements that aspect of standing doctrine designed to define "the proper—and properly limited—role of the courts in a democratic society." [55] This function of standing law, however, has been used to justify the *restriction* of access to federal courts.

Even if the majority has correctly identified the appropriate function of the zone test, it does not follow that the test must be interpreted in a restrictive fashion. The Supreme Court decisions that have used standing doctrine to define the role of the courts in a democracy have been in the context of constitutional challenges to government action.[56] Such challenges raise difficult issues about the proper judicial role because they require a non-elected judiciary on its own authority to pass on the actions of the democratic branches of government. These issues are not raised in so dramatic a fashion by the zone test, however, at least in its statutory application.[57] In that context courts are asked only to measure the authority of

[54] *Id.* at 16.

[55] Warth v. Seldin, 422 U.S. 490, 498 (1975).

[56] *E.g.*, *id.*, United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J. concurring); Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 221-23 (1974); Frothingham v. Mellon, 262 U.S. 447, 488 (1923). *But see* Flast v. Cohen, 392 U.S. 82, 100 (1968): "The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of power problems related to improper judicial interference in areas committed to other branches of the Federal Government."

[57] And the majority chooses to discuss the zone test only in its statutory application. Maj. op. at 15. For an example of the use of the zone test in the context of a constitutional challenge to a state statute, *see* Boston Stock Exchange v. State Tax Comm'n, 97 S.Ct. 599, 602 n.3 (1977).

executive action under applicable statutes.[58] Such suits represent routine, accepted and legitimate exercises of judicial power,[59] so much so that the Supreme Court has repeatedly held that "judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967).[60] Standing doctrine and reviewability doctrine raise identical issues about the nature of the judicial role in the context of statutory review of executive action. The unproblematic nature of that role is reflected in the generosity of the *Abbott Laboratories'* standard of reviewability, and it should be reflected in an equally generous standard for standing, assuming, of course, that the injury in fact requirement of Article III has been met. And this, I take it, is the underlying significance of the very liberal standards of *Arnold Tours* and *Investment Co. Institute.*[61]

[58] Investment Co. Institute v. Camp, 401 U.S. 617 (1971); Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970); Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150 (1970); Barlow v. Collins, 397 U.S. 159 (1970).

[59] *See* WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3531, at 39 (Supp. 1977).

[60] *See, e.g.*, Dunlop v. Bachowski, 421 U.S. 560, 567 (1975); Barlow v. Collins, 397 U.S. 159, 166-67 (1970). This court has noted that there is a "general rule that official administrative action is reviewable in courts when a person claims injury from an act taken by a government official in excess of his powers." Curran v. Laird, 420 F.2d 122, 128 (D.C. Cir. 1969) (en banc). *See* Scanwell Laboratories, Inc. v. Shaffer, 424 F.2d 859, 874 (D.C. Cir. 1970).

[61] There are very few decisions that find injury in fact but that deny standing on the basis of the zone test. K. C. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 22.02-11, at 510 (1976). *See* Gifford-Hill & Co., Inc. v. FTC, 523 F.2d 730 (D.C.Cir. 1975); Clinton Community Hospital Corp. v. Southern Maryland Medical Center, 510 F.2d 1037 (4th Cir.), *cert.*

B. *Technique in the Application of the Zone Test*

The majority devotes much of its opinion to a discussion of "the proper technique to employ in order to discern the Congressional intention in a manner which does not defeat other basic tenets of the law of standing."[62] The majority first concludes that congressional intent must be determined from the specific applicable statutory provision and not from the statute as a whole. It offers two reasons for this prescription: such a specific focus will ensure "complete adversariness," and it will reduce the possibilities of endless litigation that would "distort the role of the courts in relation to the legislative branch."[63]

I have difficulty following the majority's reasoning. If the basis of the zone test is the discernment of congressional purpose, a court should use whatever material is relevant to that inquiry. As Chief Justice Marshall advised a very long time ago, "[w]here the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived . . . ." *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). A traditional canon of statutory interpretation is that laws are to be read as a harmonious whole.[64] "It is undoubtedly a

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denied, 422 U.S. 1048 (1975); Higginbotham v. Barrett, 473 F.2d 745 (5th Cir. 1973); Colligan v. Activities Club of New York, Ltd., 442 F.2d 686 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971).

[62] Maj. op. at 16.

[63] *Id.* at 17-18.

[64] "We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.'" Richards v. United States, 369 U.S. 1, 11 (1962). "Emphasis should be

well-established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole." *Id.* Contradictory interpretations of differing statutory sections are avoided on the assumption that statutes constitute the expression of a coherent purpose, not a patchwork of conflicting intentions.[65] Thus consideration of an entire statute is often considered necessary to an informed interpretation of any of its particular sections. And this procedure, not surprisingly, has been a standard technique among courts applying the zone test.[66]

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laid . . . upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts." United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 544 (1940). *See* Philbrook v. Glodgett, 421 U.S. 707, 713-14 (1975); Weinberger v. Hynson, Wescott & Dunning, Inc., 412 U.S. 609, 631-32 (1973); United States v. Alpers, 338 U.S. 680, 684 (1950); Markham v. Cabell, 326 U.S. 404, 411 (1945).

[65] NLRB v. Lion Oil Co., 352 U.S. 282, 288 (1957); FPC v. Panhandle Eastern Pipeline Co., 337 U.S. 498, 514 (1949); Clark v. Uebersee Finanz-Korporation, 332 U.S. 480, 488 (1947).

[66] *See, e.g.*, Ellis v. Department of Housing and Urban Development, 551 F.2d 13, 16 (3d Cir. 1977); City of Hartford v. Towns of Glastonbury, West Hartford, and East Hartford, Nos. 76-6049,-6050,-6059, slip op. at 1096 (2d Cir. 23 December 1976); Concerned Residents of Buck Hill Falls v. Grant, 537 F.2d 29, 33-34 (3d Cir. 1976); Cincinnati Electronics Corp. v. Kleppe, 509 F.2d 1080, 1086 (6th Cir. 1975); Thompson v. Washington, 497 F.2d 626, 632 (D. C. Cir. 1973); Davis v. Romney, 490 F.2d 1360, 1365 & n.3 (3d Cir. 1974); Constructores Civiles de Centroamerica v. Hannah, 459 F. 2d 1183, 1188-89 (D. C. Cir. 1972); Colligan v. Activities Club of New York, Ltd., 442 F.2d 686, 691 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971).

The majority's attempt to distinguish *Constructores Civiles*, maj. op. at 18-19, simply will not wash. The majority states that "[i]n *Constructores* it was acceptable to examine both

The majority's reasons for abandoning this traditional approach are simply not convincing. The "complete adversariness" that it seeks, aside from being logically unconnected to the question of how many statutory provisions are at issue, is adequately served for the purposes of standing by the injury in fact suffered by the plaintiff. This injury ensures that plaintiffs have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends . . . ." *Baker v. Carr*, 369 U.S. 186, 204 (1962). And I am even more baffled by the majority's second reason, that focusing on a particular statutory section will create the possibility of endless litigation that "would distort the role of the courts in relation to the legislative branch." Examination of a particular provision in the context of an entire statute will increase the accuracy of judicial discernment of congressional purpose. And I cannot comprehend how accurately ascertaining congressional purpose can possibly distort the role of the courts with respect to Congress. Surely, the majority does not mean to argue that the possibility of increased litigation, by itself, would constitute such a distortion.

Perhaps as an illustration of its analysis, the majority blends into its theoretical reasoning a specific discussion

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particular and general provisions because those provisions shared an identity of purpose." Whether two provisions of a statute share a common purpose is a conclusion that can only be reached *after both provisions have been examined.* It therefore cannot function as a criterion of whether to examine both provisions in the first place. Driven by the illogic of their position, the majority ultimately concedes that in *Constructores* "it was necessary to examine the general language of the preamble to ensure that a grant of standing would not be inconsistent with the statutory purpose." But this reason, of course, would justify examining the general provisions of a statute *in every case.*

of the Internal Revenue Code. The Code, it notes, "does *not* have a single, unified purpose," and, therefore, litigants should not be permitted to borrow "the arguable regulatory or protective intent embodied in one provision of the Code, and apply it to a provision where that intent is not evident . . . ."[67]

As a conclusion this observation is unimpeachable, but it begs the real question. Even assuming, arguendo, that the relevant zone of interests emanates only from a particular provision of the Code rather than from the Code as a whole, the question of whether one provision of the Code is relevant to the interpretation of another can only be answered *after both provisions have been examined.* It is not a question that can be addressed in the abstract. Yet this is just what the majority opinion, drawing on its theoretical analysis, purports to do. *A fortiori* the majority completely misses the thrust of appellant Field's argument that, although various sections of the Code have different goals, the *entire* Code is infused with certain general purposes.[68] These general purposes, he claims, arguably give rise to a zone of protected interests that emanates from the Code as a whole. The majority rejects this argument on the grounds of nothing more convincing than bald assertion.

The majority reaches a second major conclusion concerning proper technique in the application of the zone test: the examination of legislative history is to be avoided and the appropriate zone determined from "the face of

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[67] Maj. op. at 18.

[68] Appellant refers to the General Statement of H.R. REP. No. 1337, 83d Cong., 2d Sess. 1 (1954), that accompanied the enactment of the Internal Revenue Code of 1954: "In general, the purpose of these changes has been to remove inequities, to end harassment of the taxpayer and to reduce tax barriers to future expansion of production and employment."

the statute."[69] The majority is aware that courts regularly resort to legislative history in order to discern the intent of Congress. It shows less awareness that courts also regularly use legislative history for the same purpose in the application of the zone test.[70] The majority argues, however, that there are three special reasons why this latter practice should cease. First, the examination of legislative history will lead to a prejudgment of the merits of the case. Second, it is likely to be unilluminating; and third, it will undermine the generous nature of the zone test.

Taking these reasons in order, there is, first, no logical connection between the use of legislative history and a prejudgment of the merits of the case.[71] The majority thus seems to be making a psychological point: "A canvassing of the entire legislative background may lead to

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[69] Maj. op. at 21. It would be well to remember the counsel of Justice Reed: "When aid to construction of the meaning of words, as used in [a] statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" United States v. American Trucking Ass'ns., Inc., 310 U.S. 534, 543-44 (1940).

[70] *See, e.g.*, Safir v. Kreps, 551 F.2d 447, 451 (D.C.Cir. 1977), *petition for cert. filed*, 46 U.S.L.W. 3013 (U.S. July 11, 1977) (No. 77-65); Rental Housing Ass'n of Greater Lynn, Inc. v. Hills, 548 F.2d 388, 390 (1st Cir. 1977); Hayes International Corp. v. McLucas, 509 F.2d 247, 256 (5th Cir.), *cert. denied*, 432 U.S. 864 (1975); Pesikoff v. Secretary of Labor, 501 F.2d 757, 760 n.2 (D.C.Cir.), *cert. denied*, 419 U.S. 1038 (1974); Secretary of Labor v. Farino, 490 F.2d 885, 889 (7th Cir. 1973); Higgenbotham v. Barrett, 423 F.2d 745, 749 (5th Cir. 1975); City of Inglewood v. City of Los Angeles, 451 F.2d 948, 955 (9th Cir. 1971); Colligan v. Activities Club of New York, Ltd., 442 F.2d 686, 691 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971).

[71] I agree with the majority, however, that standing and the merits are, and should remain, distinct issues.

a decision on the question of standing based on an assessment of the strength or weakness of the claims being presented."[72] The majority's assumption appears to be that federal judges will not be able to keep distinct issues of standing and of the merits when confronted with information relevant to both. I reject this assumption as completely unfounded. We trust federal judges to successfully perform such tasks all the time, as for example when ruling on the admissibility of evidence in non-jury trials. Standing and the merits require distinct inquiries, and federal judges are perfectly capable of using legislative history to answer the demands of each.

Second, legislative history may indeed be "unilluminating," but it also may be helpful, and there is no way of knowing until one looks. Legislative history can be and often is an important instrument in the determination of congressional intent.[73] The majority's proscription of legislative history in all cases simply because of its failure in some, reminds me of the gourmet who, having once tasted sour grapes, refused to eat anything.

Finally, there is simply no way to predict whether the resort to legislative history will expand or contract the the generosity of the zone test.[74] The results will vary from case to case. What is clear, however, is that if the determination of congressional intent is relevant, the use

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[72] Maj. op. at 19-20.

[73] *E.g.*, Harrison v. Northern Trust Co., 317 U.S. 476, 479 (1943); Commissioner of Internal Revenue v. Estate of Church, 335 U.S. 632, 687 (1949) (Frankfurter, J., dissenting, Appendix A).

[74] There is something deeply ironic in the majority's justifying its exorcism of legislative history on the grounds of defending the generosity of the zone test at the very same time as it deafens itself to appellant's arguments that, on the basis of legislative history, he is arguably within the zone of interests to be protected. *See* note 68 *supra*.

of legislative history may lead to more *accurate* applications of the test. The generosity of the test will be sufficiently protected by the legal standard that resolves in plaintiff's favor all "potential ambiguities in the legislative history" and in the face of the statute.[75]

C. *The Application of the Zone Test to Appellant Field*

The majority is aware of "the confusion surrounding the meaning of which interests are relevant to the zone test," and it concludes that what must "fall within the relevant zone" is "the particular interest the parties are asserting in the litigation." [76] Yet the majority denies Field standing because "the protective intent of the statutory section extends to all those U.S. companies doing business abroad and paying foreign income taxes" and "appellant Field cannot be said to fall within the regulatory field of concern." [77] *Therefore*, the majority argues, Field's interests cannot arguably have been intended to have been protected by § 901(b). In other words, contrary to its own advice, the majority acts as if the zone test requires the *plaintiff himself* to be within the statutory zone.

The majority's conclusion that a plaintiff's interests must fall within the relevant zone, however, is correct. *Arnold Tours* and *Investment Co. Institute* make clear that a plaintiff will satisfy the zone test if he asserts interests upon which the applicable statute will have a readily foreseeable impact.

Using this framework of analysis, the interests Field asserts are arguably within the zone of interests to be protected by § 901(b). A primary purpose of that section, as the majority clearly establishes, is to prevent the double taxation of United States corporations operating abroad. But this purpose is itself founded on the deeper principle that, as one noted scholar of the foreign tax credit has put it, "taxpayers with an equal taxable capacity should bear an equal United States tax burden. . . . [T]he result of the operation of the credit is that United States corporations . . . with the same amount of income bear an equal total tax burden on income whether or not they are subject to foreign income taxation." [78] The section thus establishes an equation of rough equality between United States corporations that must pay certain foreign taxes and those that have tax liability only to the United States government. If the IRS were mistakenly to deny a valid application for a foreign tax credit, one side of this equation would be violated. Similarly, if the IRS were mistakenly to grant a foreign tax credit, the equation would be violated on the other side. This is essentially Field's position. He claims that his interests in tax parity with his competitors who import foreign oil are implicit in the structure of § 901(b) and that his interests are therefore arguably within the zone of interests to be protected by the section.

The legislative history of § 901(b) is silent about congressional concern for those in Field's circumstances. The readily foreseeable consequences of the foreign tax credit on Field's competitive situation, however, is powerful support for his claim. His position is indistinguishable from that of the plaintiff travel agents in *Arnold Tours* or that of the plaintiff investment companies in *Investment Co. Institute.* I would therefore grant standing to appellant Field.

[75] Maj. op. at 21.

[76] *Id.* at 20 n.76.

[77] *Id.* at 23.

[78] E. Owens, The Foreign Tax Credit 3 (1961).

No. 77-681

In the Supreme Court of the United States

October Term, 1977

Tax Analysts and Advocates and Thomas F. Field, petitioners

v.

W. Michael Blumenthal, Secretary of the Treasury, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEFS FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-691

TAX ANALYSTS AND ADVOCATES, AND THOMAS F. FIELD, PETITIONERS

v.

W. MICHAEL BLUMENTHAL, SECRETARY OF THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is reported at 390 F. Supp. 927. The opinion of the court of appeals (Pet. App. A 1a-27a) and the dissenting opinion of Chief Judge Bazelon in this case and in *American Society of Travel Agents, Inc.* v. *Blumenthal*, C.A.D.C., No. 75-1782, decided September 15, 1977 (Pet. App. B 41a-71a), are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1977. By order dated August 22, 1977, the

Chief Justice extended the time within which to file a petition for a writ of certiorari to November 12, 1977 and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether petitioners lack standing to challenge the correctness of published and private rulings of the Internal Revenue Service allowing foreign tax credits to oil companies for payments made to certain foreign countries in connection with oil extraction and production.

STATUTE INVOLVED

Section 901 of the Internal Revenue Code of 1954 (26 U.S.C.).

STATEMENT

Petitioner Tax Analysts and Advocates (TAA) is a nonprofit corporation organized for the purpose of promoting federal tax reform. Petitioner Thomas F. Field is the executive director of TAA. Petitioners instituted this action in the United States District Court for the District of Columbia seeking a declaratory judgment that published and private rulings of the Internal Revenue Service allowing foreign tax credits for taxes paid by American oil companies to certain foreign countries in connection with oil extraction and production in those countries [1] were contrary to Section 901(b) of the Internal Revenue Code of 1954 and therefore were unlawful.[2] Petitioners also sought a permanent injunction requiring the Internal Revenue Service to withdraw the rulings and to collect taxes from oil companies for all periods not barred by the statute of limitations in those cases in which foreign tax credits were claimed pursuant to the rulings (Pet. App. A 2a–3a).

After petitioners filed their complaint, petitioner Field purchased for approximately $2,000 the entire working interest in a Pennsylvania oil well producing three barrels of oil a month. Petitioners thereafter filed an amended complaint alleging that Field was a "domestic oil producer" who had suffered and would continue to suffer actual economic injury as a result of the rulings allowing foreign tax credits to United States oil companies operating abroad.

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[1] The published rulings challenged by petitioners are Revenue Ruling 55-296, 1955-1 Cum. Bull. 386 (pertaining to taxes imposed by Saudia Arabia) and Revenue Ruling 68-552, 1968-2 Cum. Bull. 306 (pertaining to taxes imposed by Libya). The private rulings challenged permit tax credits for taxes imposed by Iran, Kuwait and Venezuela with respect to oil production in those countries (Pet. App. A 5a–6a).

On January 16, 1978, the Internal Revenue Service issued Revenue Ruling 78-63, which revoked Revenue Rulings 55-296 and 68-552, *supra*, with respect to Saudi Arabian and Libyan taxes paid or accrued after June 30, 1978. We are advised by the Internal Revenue Service that it is reconsidering the creditability of taxes paid to Iran, Kuwait, and Venezuela (the subject of the private rulings challenged by petitioners) in the light of the newly-issued Revenue Ruling 78-63. We are lodging a copy of Revenue Ruling 78-63 with the Clerk.

[2] Section 901(b) allows citizens of the United States and domestic corporations a tax credit for the amount of any income, war profits, or excess profits taxes paid to any foreign country. The basis of petitioners' complaint is their contention that the taxes imposed by the foreign countries covered by the rulings are in fact not taxes but royalties or excise taxes which are not creditable under Section 901.

Field asserted that he suffered discriminatory tax treatment as a result of the rulings because he is allowed only a deduction, rather than a credit, for the royalty payments he is required to make to the owner of the land upon which his well is located, while United States oil companies operating abroad receive tax credits for allegedly similar payments they make to the sovereign countries owning the land on which their oil wells are located. According to the amended complaint, the effect of this alleged discrimination was to increase the value of foreign oil well investments and decrease the value of domestic wells such as his own, and to enable the American companies producing oil abroad to charge a lower price for the foreign oil they sell in the United States, thereby lowering the market price for Field's domestic oil (Pet. App. A 6a-8a).

The government moved to dismiss petitioners' action on the ground that they lacked standing to challenge revenue rulings relating to the tax liabilities of third parties.[3] The district court held that neither petitioner had standing as a taxpayer to challenge the rulings (390 F. Supp. at 932-933). It also held that petitioner Field had no standing as an alleged competitor, since he had not demonstrated that the rulings in fact caused him injury (390 F.

[3] The government also asserted that the district court lacked jurisdiction because of the tax exception to the Declaratory Judgment Act, 28 U.S.C. 2201-2202, and the Anti-Injunction Act, 26 U.S.C. 7421, which bars injunctive actions against the assessment or collection of taxes. The district court, however, declined to rule on these contentions.

Supp. at 942-943), or that he was within the zone of interests that Section 901 of the Internal Revenue Code protects (*id.* at 942).

The court of appeals affirmed the district court's conclusion that neither petitioner TAA nor petitioner Field had standing to maintain the action (Pet. App. A 3a-4a). While the court of appeals held that petitioner Field had sustained "injury in fact," it did not decide whether there existed the requisite causal connection between the injury and the rulings of the Internal Revenue Service (Pet. App. A 10a-12a). Instead, the court concluded that petitioner Field had no standing because his competitive interest was not within the zone of interests of any relevant statute (Pet. App. A 13a-27a).[4]

ARGUMENT

1. The court of appeals correctly held that petitioner TAA did not have standing to maintain this action challenging the correctness of rulings issued by the Internal Revenue Service to third parties.

In *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, this Court rejected a similar claim of stand-

[4] In a similar suit brought by the American Society of Travel Agents (ASTA), challenging a ruling that allegedly gave overgenerous tax treatment to tax-exempt organizations sponsoring travel tours, the court of appeals likewise held that ASTA had no standing because it failed to show the requisite causation between its injury and the challenged ruling. *American Society of Travel Agents, Inc.* v. *Blumenthal*, C.A.D.C., No. 75-1792, decided September 15, 1977 (Pet. App. B 28a-40a). Chief Judge Bazelon filed a common dissent in both cases.

ing by several low-income individuals and organizations representing such individuals seeking to challenge the Internal Revenue Service policy of extending tax-exempt status to hospitals that did not provide indigents with a full range of hospital services to the extent of their financial ability. As the Court there stated, "Our decisions make clear that an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art. III. *Sierra Club* v. *Morton*, [405 U.S. 727]; see *Warth* v. *Seldin*, [422 U.S. 490]." Since petitioner Tax Analysts and Advocates is simply an organization devoted to promoting its view of tax reform, it has no standing to challenge the correctness of any ruling issued by the Internal Revenue Service.[3]

2. Petitioner Field likewise has no standing to challenge the rulings at issue. As petitioners acknowledge (Pet. 8), this Court in *Data Processing Service* v. *Camp*, 397 U.S. 150, held that a plaintiff that challenged an agency ruling issued to a third party, on the ground that the ruling caused competitive injury to the plaintiff, must show that its competitive interest was within the "zone of interests to be protected or regulated by the statute * * * in question" (397 U.S. at 153). Accord: *Barlow* v. *Collins*, 397 U.S. 159.

[3] Petitioners do not challenge the conclusion of the district court (390 F. Supp. at 932-933), affirmed by the court of appeals (Pet. App. A 3a-4a), that they do not have standing as federal taxpayers. That holding is correct. See *Massachusetts* v. *Mellon*, 262 U.S. 447; *United States* v. *Richardson*, 418 U.S. 166; *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208.

After examining the purpose of the foreign tax credit provision of Section 901 of the Code, the court of appeals concluded that petitioner Field's competitive injury, arising from his ownership of an oil well in Pennsylvania, did not fall within the zone of interests that the statute protects or regulates.

Petitioners first argue (Pet. 8-9) that the zone of interests test is "dead." But since *Data Processing Service*, this Court has consistently reaffirmed the validity of that test. See, *e.g.*, *Sierra Club* v. *Morton*, *supra*, 405 U.S. at 733; *United States* v. *SCRAP*, 412 U.S. 669, 686 n. 13; *United States* v. *Richardson*, 418 U.S. 166, 176 n. 9; *Simon* v. *Eastern Ky. Welfare Rights Org.*, *supra*, 426 U.S. at 39 n. 19.

Contrary to petitioners' contention (Pet. 10), the Eighth Circuit did not reject the zone of interests test in *Park View Heights Corp.* v. *City of Black Jack*, 467 F. 2d 1208. There, the court held that a non-profit corporation concerned with developing a federally-assisted housing project could assert the civil rights of certain individuals under 42 U.S.C. 1981-1982, and Section 815 of the Fair Housing Act of 1968, 82 Stat. 89, 42 U.S.C. 3615, because those statutes were designed to protect such interests (see 467 F. 2d at 1214). The court observed that it was dealing with standing under statutes that explicitly prohibited the conduct at issue rather than the situations in *Data Processing* and *Barlow*, where "statutory violations require[d] '[certain] public officials to perform certain functions according to the law' " (467 F. 2d at 1214 n. 7). Thus, while the court expressed its view

that "all that is required for a plaintiff to have standing to sue for a constitutional or a statutory violation is a showing of 'injury in fact,' " it stated it would "apply the rationale on 'standing' as recently discussed in Sierra Club v. Morton, *supra*" (*id.* at 1212 n. 4).

Alternatively, petitioners argue (Pet. 11–12) that the court of appeals misapplied the zone of interests test and that the maintenance of competitive fairness is one of the interests the Internal Revenue Code protects. Petitioners do not challenge the court of appeals' conclusion (Pet. App. A 22a–26a) that petitioner Field does not fall within the zone of interests that Section 901 of the Code, the statute providing the foreign tax credit, protects. Instead, petitioners urge that the court of appeals erred in failing to look to other provisions of the Internal Revenue Code, particularly Section 7805(b), which permits the Secretary to provide the extent, if any, to which any ruling or regulation shall be applied without retroactive effect.

But the Secretary's discretionary authority to issue rulings without retroactive effect has little to do with this lawsuit challenging the correctness of rulings issued pursuant to the foreign tax credit provision of Section 901, upon which petitioners' lawsuit was based. As the court of appeals correctly observed, "If litigants are allowed to transfer the Congressional purpose and intent embodied in one section of the Code into other contexts and situations regulated by different provisions of the Code, the possibilities for litigation would indeed be endless. We do not therefore believe that litigants can 'borrow' the

arguable regulatory or protective intent embodied in one provision of the Code and apply it to a provision where that intent is not evident, in order to satisfy the zone test" (Pet. App. A 18a).[6]

3. While the court of appeals did not reach the issue whether petitioner Field's competitive injury was caused by the challenged rulings and could be redressed in this lawsuit (Pet. App. A 11a–12a), the district court correctly held that there was no demonstrated nexus between their injury and the rulings. See *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40–46.

Here, it is wholly speculative whether the effect of the challenged rulings was to lower the price of foreign oil sold in the United States, and thereby lower the price petitioner Field could obtain for his domestic oil. The market price of foreign and domestic oil is a function of many interrelated and complex factors, not the least of which is foreign and United States governmental price regulation. While it is conceivable that revocation of the rulings might result in a price increase for foreign oil sold in the United

[6] *International Business Machines Corp.* v. *United States*, 343 F.2d 914 (Ct. Cl.), certiorari denied, 382 U.S. 1028, upon which petitioners rely (Pet. 11), is distinguishable. There, the issue was whether the Commissioner had abused his discretion in failing to limit the retroactive effect of a review ruling holding that certain computers manufactured by the taxpayer were subject to excise taxes. The court's determination that there was an abuse of discretion turned on the fact that the Internal Revenue Service had accorded favorable tax treatment to the only other manufacturer of the computers in question. The decision does not involve any consideration of the standing of a person whose taxes are not at issue to challenge the tax treatment of a third party.

States, it is equally conceivable that governmental regulation or economic conditions might preclude any increase in the price of such foreign oil. Moreover, it is by no means clear that the price of foreign crude oil directly affects the price petitioner Field can obtain for his oil. Field's well produces "high paraffin base Pennsylvania crude" (J.A. 54),[7] and it is well recognized that such Pennsylvania grade oil, because of its unique lubricating qualities, does not actively compete with crude oil produced elsewhere. See *United States* v. *Pennzoil Co.*, 252 F. Supp. 962 (W.D. Pa.).

Moreover, Field's further allegation that the effect of the rulings was to make foreign oil-well investments more valuable and domestic wells less valuable is equally speculative. Indeed, it is highly unlikely that revocation of the rulings would have any effect on the value of his particular well, with its minimal production capacity.

4. Finally, petitioners urge (Pet. 14) that the decision below must be overturned, because it might result in the nonreviewability of certain rulings of the Internal Revenue Service. But apart from the litigation Congress authorized to review the assessments of the Commissioner by refund suits or Tax Court proceedings, this Court has recognized that persons whose own taxes are not at issue cannot generally challenge the rulings of the Secretary of the Treasury with respect to third parties. See, *e.g.*, *Louisiana* v. *McAdoo*, 234 U.S. 627; *Simon* v. *Eastern Ky. Welfare Rights Org.*, *supra*.

[7] "J.A." references are to the joint appendix filed in the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the

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W. MICHAEL BLUMENTHAL, Secretary
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v.

W. MICHAEL BLUMENTHAL, Secretary
of the Treasury of the United States, *et al.*,
Respondents.

REPLY BRIEF FOR THE PETITIONERS

The petition in this case for a writ of certiorari to the Court of Appeals for the District of Columbia Circuit was timely filed, pursuant to an order granting an extension of time, on November 12, 1977. The Respondents' brief in opposition was untimely filed on January 27, 1978. This reply is submitted, pursuant to Rule 24 of this Court, to describe an important intervening development since November 12, 1977, and to respond to arguments first raised in the brief in opposition.

I

THE IRS NOW ADMITS THAT IT HAS MISINTERPRETED THE TAX LAW, BUT IT CLAIMS THE RIGHT TO CONTINUE TO DO SO, FREE OF JUDICIAL REVIEW.

In their brief in opposition (Br. 8), the respondents argue that the scope of the administrative discretion accorded to the Commissioner of Internal Revenue by Section 7805(b) of the Internal Revenue Code "has little to do with this lawsuit challenging the correctness of rulings issued pursuant to the foreign tax credit provision of Section 901 [of the Internal Revenue Code] . . ." Recent events show that this statement is incorrect. Indeed, this suit now focuses squarely on the degree to which Section 7805(b) confers on the Commissioner of Internal Revenue unfettered and unreviewable administrative discretion. A summary of recent events will show why this is so.

On January 16, 1978, the respondents released a set of press announcements and Internal Revenue Service rulings which admit the correctness of the arguments with respect to Section 901 of the Internal Revenue Code that have been advanced by the petitioners in this case. Those announcements and rulings effectively remove from this case any controverted questions relating to Section 901 of the Internal Revenue Code. Without explicitly referring to this case, the respondents have admitted that the petitioners are correct in their arguments regarding Section 901, and that the Internal Revenue Service has heretofore failed to carry out the intent of Congress with respect to that section. Because of their importance, these rulings and press announcements are reprinted as Appenidx A, *infra*.

Under normal circumstances, the belated admission by the respondents that the petitioners are correct on the merits would largely end this case, except as to past years, for which relief is sought in this suit. However, in an unprec-

edented[1] action, the Commissioner of Internal Revenue, while admitting the incorrectness of his prior interpretation of Section 901, has given the private beneficiaries of his mistake almost a full additional year to benefit from that mistake.[2] In addition, the Kuwaiti, Iranian, and Venezuelan rulings that are challenged in this suit remain fully in effect. Accordingly, the injury to the competitive interests of petitioner Field continues unabated, and the injury to the pub-

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[1] By its terms, Section 7805(b) confers on the Commissioner of Internal Revenue power to apply changes in IRS rulings and regulations "without retroactive effect." It does not permit the Commissioner to give prospective effect to an admittedly illegal and erroneous interpretation of the law. It is important, in this connection, to note that the apparently uniform practice of the Service in the past has been to revoke erroneous rulings, *with effect from the date of the announcement of the revocation.* For example, on March 9, 1977, the Service issued Revenue Ruling 77-85, 1977-1 Cum. Bull. 12, to correct prior rulings which had been issued in error. The new ruling was effective for all investments after March 9, 1977. In contrast, the oil rulings challenged in this case have been allowed to remain in full effect through June 30, 1978, and, in practice, they will be fully in effect until January 1, 1979. Section 7805(b) does not appear to provide any warrant for this degree of prospectivity, and no similar prior instance has been discovered by the petitioners.

[2] The challenged rulings have been revoked by the Commissioner for "taxable years beginning after June 30, 1978." However, judicial notice of the public records of the Securities and Exchange Commission will show that substantially all of the major international oil companies operate on a calendar year basis. This is true, for example, of the "seven sisters," Exxon, Gulf, Mobil, Shell, Socal, Standard of Indiana, and Texaco. Hence, the revocation of the Saudi Arabian and Libyan rulings will not affect them until January 1, 1979, at the earliest. And of course, the Kuwaiti, Iranian, and Venezuelan rulings that are challenged by this suit remain in effect.

lic revenues – which already totals more than $5 billion since this suit was filed – will continue.[3]

These developments pose even more starkly than before the ultimate question presented by this case: the extent to which Section 7805(b) of the Internal Revenue Code gives the Commissioner of Internal Revenue unfettered and unreviewable administrative discretion to perpetuate admittedly erroneous and illegal administrative rulings that seriously injure competitive relationships and result in massive federal revenue losses.[4]

This case thus presents for the Court's consideration an extraordinary anomaly in our law relating to the scope of judicial review of administrative decisions. The lower court opinions in this case stand for the general proposition that the decisions of the Commissioner of Internal Revenue are unreviewable by the courts – even when they cause competitive injury and huge revenue losses – so long as the Commissioner gives away federal revenue.

This proposition is contrary to the mainstream of thinking regarding the scope of judicial review of administrative action. Judicial review of agency rules has become the norm, and nonreviewability is the rare exception. Judicial review

[3]The Treasury Department has recently furnished estimates of the revenue losses attributable to the challenged rulings to the Subcommittee on Commerce, Consumer, and Monetary Affairs of the House Committee on Government Operations. For the periods subsequent to the filing of this suit, the Treasury revenue loss figures are as follows: 1974–$2,700,000,000; 1975–$1,700,000,000; 1976–$1,200,000,000; 1977 and 1978–not yet available.

[4]See footnote 3, *supra*, for the Treasury Department's estimates of the recent revenue losses attributable to the challenged revenue rulings.

is widely considered to be a wise antidote to administrative lethargy and the control of administrative agencies by regulated interests; the courts and administrative agencies are viewed as being engaged in a collaborative effort to implement the will of Congress. In interpreting federal statutes, this Court has gone out of its way to find that judicial review has not been precluded or committed to agency discretion.[5]

There is no reason why the rule should be different in tax cases. Suits such as this call upon the Commissioner of Internal Revenue to collect more revenue, not less, and the strictures of Section 7421 of the Internal Revenue Code are therefore inapplicable. In addition, with the possible exception of military service, the payment of taxes is the most fundamental duty a member of the polity owes to the political community. The maintenance of tax fairness is therefore a proper focus of judicial concern, especially when powerful political interests are able to affect the relevant legislative and administrative processes.

Nor is there anything inherently nonjusticiable about tax controversies. This Court routinely handles federal tax questions and has been the principal federal agency implementing the power granted to Congress by the Commerce Clause to regulate the state taxation of interstate commerce.[6]

It is necessary, of course, that there be a proper party to bring cases before this Court in an adversary context.

[5]See, for example, *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) and *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

[6]See, for example, *Northwestern States Portland Cement Company v. Minnesota*, 358 U.S. 450 (1959), and *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, rehearing denied, 430 U.S. 976 (1977).

Whether such a party can ever exist – in instances in which the Commissioner of Internal Revenue gives away money in an admittedly improper way – will depend to a substantial degree on the interpretation given to the rules of standing in this case. As things are, the Commissioner of Internal Revenue has arrogated to himself unfettered and unreviewable administrative discretion to interfere with competitive relationships and give away federal revenues without judicial review.

II
THE RESPONDENTS HAVE MISAPPLIED THE LAW OF STANDING TO THE CIRCUMSTANCES OF THIS CASE.

The respondents argue (Br. 7) that the zone of interest test, which was relied on by the Court below to deny standing to petitioner Field, has been "consistently reaffirmed" by this Court. But the cited materials hardly amount to consistent reaffirmation. It is true that the zone of interest test has on occasion been alluded to by this Court since 1970, but it has not been applied, even in those cases in which it was most relevant.[7]

It is therefore not surprising that most courts and commentators have come to the conclusion that the zone of interest test is dead. As Professor Kenneth Culp Davis has put it in his administrative law treatise, "Probably the most common treatment of the 'zone' test is to pay homage to it verbally but to ignore it in substance."[8] For this reason,

[7] *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

[8] Kenneth Culp Davis, *Administrative Law of the Seventies, Supplementing Administrative Law Treatise*, June 1976, p. 512.

the majority opinion in this case in the Court below cries out for guidance, and that guidance will not be forthcoming absent a decision by this Court.

The respondents also argue (Br. 7) that there is no conflict between the decision of the Court below in this case, and the Eighth Circuit's decision in *Park View Heights Corp. v. City of Black Jack*, 467 F.2d 1208 (1972). This assertion is based on a misreading of the Eighth Circuit's decision. That Court's statement that it would "apply the rationale on standing as recently discussed in *Sierra Club v. Morton*, [405 U.S. 727]" referred not to the zone test but to the prudential limitations relating to a plaintiff's personal stake in the outcome of a suit, the adversary context, and the ripeness of suits for judicial review.

Moreover, the confusion in the courts below does not stop with the *Park View Heights* case. The Third Circuit has gone through the motions of applying the zone test, while stating its opposition to it,[9] and the Fifth Circuit in a recent standing decision has simply ignored it.[10] There is even more confusion about the nature of the "interest" referred to in the zone test, and still more over how statutes are to be construed in administering the test.[11] The

[9] *Merriam v. Kunzig*, 476 F.2d 1233 (C.A. 3)(1973). Significantly, that case stated that a plaintiff should be allowed to defend the public interest in court, provided that he has suffered injury in fact, even if the statutes involved "were designed to protect no zone of interest within which he falls . . ." 459 F.2d 1183 at 1188. On this basis, it appears that the present petitioners would have standing in the Third Circuit.

[10] *Florida v. Weinberger*, 492 F.2d 488 (C.A. 5)(1974).

[11] See generally, Kenneth Culp Davis, *Administrative Law of the Seventies, Supplementing Administrative Law Treatise*, Sec. 22.02-11 June 1976.

zone of interest test is therefore very much in need of clarification or decent burial.

The respondents also advance a variety of arguments regarding the injuries suffered by petitioner Field, in an attempt to bring this case within the ambit of this Court's decision in *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26 (1976). Most of these arguments are inapposite, because *EKWRO* did not involve explicitly pleaded competitive injuries. Indeed, the injuries described in the complaint in this case are far more obvious and direct than the petitioners' injuries that formed the basis for standing in *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976). As the more recent precedent, *Planned Parenthood* is entitled to more weight than *EKWRO.*

Even more important, however, the factual arguments by the respondents regarding Field's injuries appear to disregard the pleaded facts of this case. For example, the respondents argue (Br. 9) that the price of Field's oil might be affected by price controls, even though the pleadings in this case make it crystal clear that price controls are inapplicable to the production from his well. See the amended complaint, paragraph 4(b). Similarly, the respondents seek to argue (Br. 10) that the price for Pennsylvania grade crude oil is not established by the world market price for oil. This is not the fact, as the complaint makes clear. See the amended complaint, paragraph 18.

Finally, the respondents advance (Br. 10) a generalized argument "that persons whose own taxes are not at issue cannot generally challenge the rulings of the Secretary of the Treasury with respect to third parties." The Respondents attribute this argument to "this Court," although it in fact appears only in the concurring opinion of Justice Stewart in the *EKWRO* case, *supra.*

It is not at all clear that Justice Stewart who advanced this argument in a somewhat speculative way in his *EKWRO* opinion, wished it to be expanded so as to open a gaping hole in our established system of judicial review of administrative decisions. See Argument I, *supra.* Did Justice Stewart really mean to empower the Commissioner of Internal Revenue to forgive, as in this case, more than $5 billion in federal revenue, through a series of admittedly illegal rulings, to the detriment of thousands of domestic oil producers, without any possibility of judicial review? Did he mean to reverse or abandon the decision with respect to competitor standing in *International Business Machines Corp. v. United States,* 343 F.2d 914 (Ct. Cls. 1965), *cert. denied,* 382 U.S. 1028 (1966)?

Certiorari should be granted so that this Court can speak on these and the other important questions presented by this case. Certiorari should also be granted to bring to an end the harm that petitioner Field, in common with other domestic oil producers, continues to suffer as a result of what now are admitted to be illegal and erroneous actions by the Commissioner of Internal Revenue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS F. FIELD
Counsel for Petitioners

CERTIFICATE OF SERVICE

I, Thomas F. Field, attorney for the petitioners and a member of the bar of the United States Supreme Court, do hereby certify that on this 17th day of February, 1978, I served copies of the foregoing reply brief on the attorneys of record for the respondents herein, Wade H. McCree, Jr.; M. Carr Ferguson; Leonard J. Henzke, Jr.; and Richard Farber, by mailing three copies of the same, postage prepaid, to each of them at their offices at the Department of Justice, Washington, D.C. 20530.

Thomas F. Field
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Immediate Release
Monday, January 16, 1978

Contact: George Ross
566-2356

**TREASURY ANNOUNCES NEW IRS RULINGS
ON FOREIGN TAX CREDITS**

The Treasury Department today announced the issuance of three Internal Revenue Service revenue rulings concerning the credits that U.S. businesses may take against their U.S. income taxes for taxes paid to foreign countries.

One of these rulings concludes that amounts received by Libya from U.S. oil companies operating in that country are not foreign income taxes and therefore may not be credited against U.S. income taxes. Today's ruling revokes an inconsistent 1968 ruling involving Libya.

Today's ruling also revokes a 1955 IRS ruling on the basis of which payments to Saudi Arabia under a posted price system have been treated as income taxes that may be credited by U.S. oil companies against their U.S. income taxes.

The ruling issued today will take effect for taxes paid or accrued by the companies in their taxable years beginning after June 30, 1978. When an IRS ruling is revoked, the general rule is that the revocation takes effect only for the future. Revocations are not retroactive because taxpayers are entitled to rely on an IRS ruling until the IRS concludes that the ruling is no longer valid.

A principal basis for the conclusion of the ruling is the use of posted prices in computing the companies' tax payments. "Posted prices" are an arbitrary price which exceeds the market price of oil. They have been used to determine the oil companies' income, raising their nominal income and their foreign tax liabilities above the levels that would result from actual market prices.

The IRS has recently received advice that Saudi Arabia may no longer use posted prices in determining taxpayer liability. The IRS has not received detailed disclosure of all relevant

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information as to the current system employed by Saudi Arabia and has not been asked to determine the effect that revocation of the 1955 ruling will have on foreign tax credits claimed under a system not involving posted prices.

Foreign income taxes may be credited against income taxes owed to the United States. In determining whether a foreign tax qualifies as an income tax that can be credited against U.S. taxes, the U.S. Supreme Court has held that U.S. standards apply. The IRS ruling finds the Libyan and Saudi Arabian taxes have been in conflict with important U.S. standards of when a foreign tax may be used as a credit:

* The purpose of a foreign income tax must be to reach "net gain" and the tax must be structured so as to be almost certain of doing so. Thus, a foreign levy is not an income tax as defined under United States standards if it is intentionally structured to tax artificial or fictitious income, as is the case with tax systems that use mechanisms such as the posted price.

* A foreign tax can be credited only if it is imposed on income that is "realized." Income under the Libyan system is not "realized" within the meaning of this standard since taxes are imposed even if sales are not made.

Under the ruling issued today, payments under the posted price system could be deducted from gross income in determining income subject to U.S. tax. Before today's ruling, such payments offset, dollar for dollar, taxes the companies would have owed to the United States.

For example, assume that on $100 of taxable income by U.S. standards the U.S. tax is $48 and the tax paid to a foreign government is $85. Prior to the ruling, the foreign tax credit would fully offset the U.S. tax of $48 (and leave an excess credit of $37), which could be used against U.S. tax on other lower-taxed oil extraction income from foreign sources, if any). After the ruling takes effect, the U.S. tax would be 48 percent of $15 (100 - 85) or $7.2, compared to a tax of zero before today's ruling.

Under the conditions that have prevailed in the past, the use of a credit rather than a deduction for amounts paid by U.S. oil companies to Libya and Saudi Arabia resulted in tax benefits of approximately $600 million in 1976, the most recent year for which data is available. The revocation of the ruling does not imply that the amount of such tax benefits will necessarily be eliminated or reduced. That determination cannot be made without full information about the foreign tax laws that will apply to actual operations in taxpayer fiscal years beginning after June 30, 1978. Also, it is not known if the affected companies could reorganize to avoid the effect of the revocation.

Although it is not now known if any tax increase will result from the revocation of the 1955 and 1968 rulings, if there were such an increase, it could be absorbed by the oil companies or by the producing countries or passed on in the form of higher product prices. The increase in gasoline prices attributable to the maximum conceivable tax increase would be less than one-tenth of a cent per gallon.

Today's ruling resulted from an extensive general review of the foreign tax credit conducted over the past four years.

Today's decision was made in the normal course of administering U.S. tax laws and the conclusion reached in the ruling was required by statute and court decisions. The IRS's recommendations were reviewed by Treasury Secretary W. Michael Blumenthal before the ruling was issued by IRS Commissioner Jerome Kurtz.

Two other rulings dealing with the issue of when foreign taxes may be credited against U.S. tax liabilities are also being issued today. The first of these denies a tax credit for a mining tax imposed by the Province of Ontario, Canada. The Ontario tax was found in conflict with U.S. standards concerning income taxes:

* The foreign tax on trade or business income must permit the deduction of the generally significant expenses incurred in producing that income. The failure to allow such deductions conflicts with the U.S. rule that income taxes must be designed to reach "net gain."

* The foreign tax must be imposed on the receipt of income by the taxpayer rather than on transactions such as sales or the exercise of a privilege or a franchise such as exploiting natural resources.

The IRS concluded that this tax is an excise or privilege tax, rather than an income tax, and therefore may not be credited against U.S. income taxes.

The third ruling reviews a number of court cases and IRS rulings, reverses outstanding positions allowing credits for certain Haitian, French, Indian and Cuban taxes, and reaffirms an existing ruling allowing credit for a Mexican tax on mineral royalties. This ruling also reviews pertinent court cases and generally discusses the principles of the U.S. foreign tax credit.

Copies of the ruling with respect to Libya and the accompanying rulings are attached to this news release and will be published shortly in the Internal Revenue Bulletin.

Taxpayers who desire guidance as to whether particular foreign taxes are creditable may request a ruling from the Internal Revenue Service in accordance with the procedures of Revenue Procedure 72-3, which is published at 1972-1 Cumulative Bulletin, page 698 and Revenue Ruling 67-308, which is published at 1967-2 Cumulative Bulletin, page 254.

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News Release

For Release: Mon., Jan. 16, 1978
3:00 P.M. EST

Department of the Treasury
Internal Revenue Service
Public Affairs Division
Washington, DC 20224

Media Contact: Tel. [illegible]
Copies: Tel. [illegible]

IR-1937

Washington, D.C.--Three new rulings relating to the foreign tax credit were today issued by the Internal Revenue Service. These rulings result from the continuing IRS study of the creditability of amounts paid to foreign governments.

The three new rulings (Revenue Ruling 78-61 through 78-63) are attached and will appear in Internal Revenue Bulletin No. 1978-8, dated February 21, 1978.

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PART I

SECTION 901.--TAXES OF FOREIGN COUNTRIES AND OF POSSESSIONS OF UNITED STATES

26 CFR 1.901-1: Allowance of credit for taxes.
(Also Section 903; 1.903-1.)

Rev. Rul. 78-61

Advice has been requested whether the tax imposed by section 3(1) of the Ontario Mining Tax Act, being chapter 275 of the Revised Statutes of Ontario, 1970, as amended by Chapter 19 of the Mining Tax Amendment Act of 1971 (the Act), is an income tax within the meaning of section 901(b) of the Internal Revenue Code of 1954.

If the profit of a mine located in the Province of Ontario exceeds $50,000, section 3(1) of the Act imposes an annual tax of 15 percent on all the profit of such mine including the first $50,000 of such profit.

Section 3(3) of the Act defines the term "profit" as:

(a) the amount of the gross receipts from the output of the mine during the taxation year; or

(b) in case the ore, mineral or mineral bearing substance, or a part thereof is not sold but is treated by or for the owner, holder, lessee, tenant, occupier, or operator of the mine, the amount of the actual market value of the output at the pit's mouth; or

(c) if there is no means of ascertaining the actual market value of the output at the pit's mouth, the amount at which the mine assessor appraises such output...;

less the expenses allowed by section 3(3)(d) through (n) of the Act. (Emphasis added.)

The term "pit's mouth" refers to the loading point at the mine's ground level of the conveyor or other transportation facility that delivers a mineral substance to the pick-up point for shipment from the mine property to market or that delivers it to the treatment or manufacturing plant.

The term "output" is defined by section 1(i) of the Act as all mineral substances:

> raised, taken or gained from any mine or land in Ontario which (a) have been sold, or (b) have been incorporated in a manufacturing process, or (c) have been treated or partially treated at any mill, smelter or refinery on or off the mining premises from which they were taken, and the product thereof has been sold.

The Act is designed to tax only the profit derived from the extraction of output in Ontario (the "mining function") in contrast with the profit attributable to manufacturing that output (the "manufacturing function") or concentrating, milling, smelting, refining, or otherwise treating that output (the "treatment function"). Because profit from the mining function is essentially the value of output at the pit's mouth reduced by deductions for allowable expenses, it is necessary under the Act to determine the aggregate value at the pit's mouth of output (a) that is sold without treatment or manufacture, (b) that is incorporated in a manufacturing process, and (c) that is treated and then sold.

Output that is sold without treatment or manufacture is described in section 1(i) of the Act as "...mineral substances... which have been sold." Under section 3(3)(a) the value of output sold without treatment or manufacture is the gross sales receipts received therefor. The value of such output is included in computing the mining profit for the taxable year in which the output is sold.

Output incorporated in a manufacturing process is described in section 1(i) of the Act as "...mineral substances... incorporated in a manufacturing process..." The market value at the pit's mouth of such output is estimated pursuant to section 3(3)(b) of the Act. For example, to arrive at "actual market value" of a mineral incorporated in the manufacturing process, the Ontario

mine assessor sometimes takes the actual sales price per ton received by a company from incidental sales of a mineral not incorporated in a manufacturing process or, if none, then an independent arm's length price, and discounts its price, usually not more than 20 percent. The mine assessor then multiplies this discounted figure by the number of unsold tons of the mineral incorporated in the manufacturing process to arrive at the actual market value of such mineral. The market value of the above output is included in computing the mining profit for the taxable year when the mineral is incorporated in a manufacturing process rather than when materials manufactured from such output are sold.

Output that is treated prior to being sold is described in section 1(i) of the Act as "...mineral substances which have been treated or partially treated at any mill, smelter or refinery on or off the mining premises from which they were taken, and the product thereof has been sold." The market value at the pit's mouth of such output is included in computing the mining profit for the taxable year in which such output is actually sold. If no actual market value can be attributed to the output under section 3(3)(b) before treatment, the market value at the pit's mouth of treated output is appraised under section 3(3)(c). The mine assessor is required, under Ontario law, to appraise the market value at the pit's mouth of output that is treated by reducing the sales proceeds of the treated output by: (1) the treatment and marketing costs of the treated output; (2) a 15 percent allowance for depreciation of the treatment equipment; (3) all administrative and general expenses attributable to treatment; and (4) a profit allowance for treatment.

The profit allowance for treatment is a set figure equal to 8 percent of the original cost of the concentrating facilities if output is only concentrated or milled, 16 percent of the original cost of the smelting facilities if output is concentrated and smelted, and 20 percent of the original cost of the refining facilities if the output is concentrated, smelted, and refined. However, the profit allowance for treatment cannot be less than 15 percent or more than 65 percent of the combined net profit from the mining and treatment functions.

Once the value of output sold during the taxable year without being treated or manufactured, the value of output sold during the taxable year that has been treated, and the value of output incorporated in a manufacturing process during that year, are determined, the total value is then reduced by the deductible expenses enumerated in section 3(3)(d) through (n) of the Act.

Expenses that are deductible in computing profit from output in section 3(3)(d) through (n) of the Act are generally similar to deductions allowed under the income tax laws of the United States.

Nondeductible expenses under the Act include:

(1) all development expenses paid or incurred by a mining company prior to a mine's commencing production in Ontario if the mine commenced production prior to January 2, 1965, or if and to the extent the ore taken from the mine was not smelted in Canada;

(2) any exploration expenses for ascertaining the existence, extent, location, or quality of any mineral deposit paid or incurred prior to the development stage of the mine;

(3) all expenses incurred for exploration and development work in Ontario that did not result in a producing mine, even though the taxpayer may have had a producing mine somewhere else in Ontario to which these expenses were not connected;

(4) except for a minor provincial tax on surface property and for sales and excise taxes on the purchase of goods and equipment, all Dominion, municipal, and Province of Ontario taxes including the Ontario Corporate Income Tax;

(5) any loss on the sale of the property on which the mine is located;

(6) cost or other depletion including any expense incurred in acquiring the real property on which the mine is located or in acquiring the right to mine, or an option on the right to mine, such mineral deposits;

(7) all royalties paid in respect of, or for the output of, mines located on private property, including not only payments to a person on account of that person's economic interest in the minerals in place but also payments that would be regarded under Federal income tax law as rent for the use of the land on which the mine is located;

(8) all interest paid on borrowed money including that paid on bonds issued by the taxpayer at a discount; and

(9) most expenses for annual shareholder meetings and distribution of notices and reports to shareholders, advertising expenses other than for promoting of sales and recruitment of employees, bank charges for storage of securities, 50 percent of directors' fees and expenses, stock exchange fees, transfer and registration fees, membership fees in chambers of commerce or similar organizations, subcriptions to nonmining publications, and salaries or expenses not directly connected with mining or treatment.

Section 901(b) of the Code generally allows qualifying United States taxpayers to claim a foreign tax credit for the amount of any income, war profits, or excess profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States. Section 1.901-2(b) of the Income Tax Regulations provides, in part, that the term "foreign country" includes any foreign state or political subdivision thereof.

Section 903 of the Code provides that the term "income, war profits, and excess profits taxes" shall include a tax paid in lieu of a tax on income, war profits, or excess profits otherwise generally imposed by any foreign country or by any possession of the United States. Section 1.903-1(a) of the regulations lists the following requirements for a qualifying "in lieu of" tax: (1) that the country has in force a general income tax law; (2) that the taxpayer claiming the credit would, in the absence of a specific provision applicable to such taxpayer, be subject to such general income tax; and (3) that such general income tax is not imposed upon the taxpayer thus subject to such substituted tax.

The first question presented is whether the tax imposed by the Act is an indivisible tax or is divisible into separate taxes on three separate tax bases under section 3(3)(a), (b), and (c) of the Act.

Generally, a foreign tax is divisible into separate taxes if it is levied on more than one separate tax base and the tax on each base is separately computed. See Rev. Rul. 74-435, 1974-2 C.B. 102; Rev. Rul. 59-208, 1959-1 C.B. 192, as amplified by Rev. Rul. 63-268, 1963-2 C.B. 208; and Lanman & Kemp-Barclay & Co. of Colombia v. Commissioner, 26 T.C. 582 (1956).

Under the act gross receipts from the sale of output that is not treated or manufactured are added together with the estimated market value of output at the pit's mouth that is incorporated in a manufacturing process and with the appraised market value of output at the pit's mouth that is treated and sold. The total is then reduced by the expenses in section 3(3)(d) through (n) of the Act attributable to the three types of output referred to in section 3(3)(a), (b), and (c) of the Act in arriving at the profit or the base on which the tax is levied. Thus, in computing the mining profit subject to tax under the Act, the value of the three types of output referred to in section 3(3)(a), (b), or (c) of the Act and the expenses attributable thereto are so interwoven as to constitute a single tax base upon which the tax is computed rather than three separate tax bases. Accordingly, the tax imposed by section 3 of the Act is an indivisible tax.

The second question presented is whether the tax imposed by section 3 of the Act qualifies as an "income tax" within the meaning of section 901(b) of the Code.

Whether a foreign tax qualifies as an income tax within the meaning of section 901 of the Code depends on whether that tax constitutes an "income tax" as determined from an examination of the Federal income tax laws of the United States. Biddle v. Commissioner, 302 U.S. 573 (1938), 1938-1 C.B. 309, and Bank of America Nat'l T. & S. Ass'n v. United States, 459 F.2d 513, 518 (Ct. Cl. 1972), cert. denied, 409 U.S. 949 (1972). Thus, the courts have often said that a foreign tax will be considered to be an income tax within the meaning of section 901 only if that tax is the substantial equivalent of the income tax in the United States sense.

See e.g., Commissioner v. American Metal Co., 221 F.2d 134 (2d Cir. 1955); and F. W. Woolworth Co. v. Commissioner, 54 T.C. 1233 (1970), non acq. on another issue, 1971-2 C.B. 4.

Whether a foreign tax is the substantial equivalent of an income tax in the United States sense "depends primarily on the measure of the tax or the tax base." Rev. Rul. 69-653, 1969-2 C.B. 152. Thus, to qualify as an income tax in the United States sense, a foreign tax must, at the very least, satisfy several requirements. Whether these requirements are met is determined by reference to the entire class of taxpayers subject to the foreign tax and not on a taxpayer-by-taxpayer or transaction-by-transaction basis. Bank of America Nat'l T. & S. Ass'n v. United States, and Rev. Rul. 64-260, 1964-2 C.B. 187. Moreover, when a tax is imposed on a limited tax base or on a limited class of taxpayers and the tax includes a provision that violates one of these requirements, then the importance of that aberrational provision is necessarily increased by the limited scope of the tax base or class of taxpayers.

The first requirement relevant to the instant case is that the gain on which the foreign tax is levied must be realized in the United States sense. The United States Federal income tax, a tax of general application, does tax in certain limited situations the constructive or deemed receipt of income. However, as a whole the Federal income tax is imposed on gain actually realized. Eisner v. Macomber, 252 U.S. 189 (1920), 3 C.B. 25. A substantially equivalent degree of realization is required with respect to foreign taxes. Commissioner v. American Metal Co., Keasbey & Mattison Co. v. Rothensies, 133 F.2d 894 (3d Cir. 1943), and Lanman & Kemp-Barclay & Co. of Columbia.

The second requirement relevant to the instant case is that a foreign tax will not be considered to be an income tax in the United States sense unless its purpose is to reach net gain and it is so structured as to be almost certain of doing so. Bank of America Nat'l T. & S. Ass'n v. United States, 459 F.2d 513 (Ct. Cl. 1972); Bank of America Nat'l T. & S. Ass'n v. Commissioner, 61 T.C. 752 (1974). Generally, a foreign tax is almost certain to fall on net gain if levied on income computed in such a manner that it is very unlikely that taxpayers generally subject to that tax will have to pay it when

they have no net gain. See the United States Court of Claims decision in Bank of America Nat'l T. & S. Ass'n v. United States at 524, wherein it was stated that the "...only question is whether it is very unlikely or highly improbable that taxpayers subject to the impost would make no profit or would suffer a loss." See also Allstate Ins. Co. v. United States, 419 F.2d 409 (Ct. Cl. 1969).

Certain foreign taxes on gross dividends, interest, and royalties have been held to qualify as income taxes in the United States sense. See, e.g. Rev. Rul. 73-106, 1973-1 C.B. 343. These taxes qualify because it is presumed that the expenses ordinarily connected with such income will almost never exceed that income. Therefore, a foreign tax imposed on such income will be almost certain of reaching net gain. Bank of America Nat'l T. & S. Ass'n v. United States. Additionally, similar taxes have long been imposed by the United States on dividends, interest and royalties paid to nonresident aliens and foreign corporations (which are not effectively connected with the conduct of a trade or business in the United States) as a basic part of the United States income tax system. See sections 871(a)(1)(A) and 881(a)(1) of the Code. The thrust of these United States tax provisions is realistically directed against net gain or profit. See Bank of America Nat'l T. & S. Ass'n v. Commissioner 61 T.C. 752 (1974).

However, expenses incurred in producing gross trade or business income are not inherently so slight as to insure that they will almost never exceed the amount of that gross income and thus not produce a loss. For this reason a foreign tax on income from engaging in business in the foreign country that does not permit the deduction of the generally significant expenses incurred in producing that income is not almost certain to fall on net gain. Such a tax is not creditable. Cf. Rev. Rul. 74-435, 1974-2 C.B. 204, wherein this rationale was applied to sustain the creditability of a Swiss communal tax on business income. See also Keasbey & Mattison Co. v. Rothensies; and Continental Insurance Co., 40 B.T.A. 540 (1939).

In Keasbey & Mattison Co. v. Rothensies, the court held the Quebec Mining Tax not to be a creditable income tax in part because it restricted allowable deductions only to expenses incurred in the mining operation itself and failed to allow deductions for the significant expenses incident to the general conduct of the mining business. The Court of Claims in Bank of America Nat'l T. & S. Ass'n v. United States interpreted the Keasbey opinion as involving:

...a mining business which obviously could either have lost or made money in any particular year. In that context, it was significant that "the expenses incident to the general conduct of the business, as distinguished from the cost incurred in the mining operation, are not deductible" (133 F.2d at 898); those non-deductible expenses could easily have made the difference between a net profit and a loss. For that business it could not possibly have been said that the tax would always, or almost always, reach some net gain. (Emphasis added.)

The final requirement relevant to the instant case is that in order for a foreign tax to qualify as an income tax in the United States sense, the tax in question must be imposed on the receipt of income by the taxpayer rather than on transactions such as sales or the exercise of a privilege or a franchise, such as exploiting natural resources. Commissioner v. American Metal Co.; Keasbey & Mattison Co. v. Rothensies; and Rev. Rul. 57-62, 1957-1 C.B. 241. Furthermore, a tax, such as an excess tax that is imposed on subjects other than the receipt of income, is not creditable even if the measure of the tax base is net income. St. Paul Fire and Marine Insurance Co. v. Reynolds, 44 F. Supp. 863 (D. Minn. 1942); Motland v. United States 192 F. Supp. 358 (N.D. Iowa 1961); and Rev. Rul. 58-3, 1958-1 C.B. 263.

Whether a tax is a privilege, excise, or income tax must be determined by examining the foreign law in its entirety. Thus, for example, to the extent that a tax is imposed on a tax base that includes a nonrealization event, does not allow for the deduction of expenses, or is a condition for permission to engage in a certain business, then these factors and others, will be considered in determining the nature of the tax. Commissioner v. American Metal Co.; Keasbey & Mattison Co. v. Rothensies; and, Elias Mallouk v. Commissioner 34 B.T.A. 269 (1936).

In the present case, the tax imposed by section 3 of the Act is an indivisible tax imposed on a very limited tax base; that is, it falls on profit from only three items: (1) the sale of mineral output; (2) the incorporation of mineral output in a manufacturing process; and (3) the sale

of treated mineral output. Because section 3(1) of the Act imposes a tax when output is incorporated in a manufacturing process under section 3(3)(b), this indivisible tax, in part, is not imposed on the receipt of realized income in the United States sense in violation of requirements (1) and (3) above.

Also, the tax imposed by section 3(1) of the Act denies or limits the deduction of sufficient expenses in computing profit from the mining function on treated output under section 3(3)(c), on manufactured output under section 3(3)(b), and on output sold without treatment or manufacture under section 3(3)(a), to make it possible for the taxpayer to show a net gain and thus have to pay the Ontario Mining Tax, even though it had a net loss in the United States sense from mining. Thus, the tax is not almost certain of falling on net gain, as the following discussion indicates.

First, a tax free recovery of invested capital has always been a characteristic of an income tax in the United States sense. However, like the Quebec Mining Tax discussed in the Keasbey decision and unlike the Code, the Act allows no deduction for the taxpayer's expense in acquiring the ore body because cost or other depletion, the cost of acquiring the right to mine or an option in the right to mine, and any loss on the sale of the real property on which the mine is located are all nondeductible. Because the Act does not allow a taxpayer to recover the taxpayer's cost (invested capital), it is effectively taxing that capital.

Second, although much of the financing for mining ventures may be derived from loans, the Act prohibits the deduction of all interest expense, regardless of the amount or purpose for which it was incurred.

Third, under Federal income tax law, royalties paid by a mining company to a landowner or other person on account of that person's economic interest in the minerals in place are not included in the mining company's income. However, under the Act, a mining company cannot exclude or deduct from its gross mining profit the royalties it pays to a landowner on account of the latter's economic interest in the minerals in place. Section 3(5)(d) of the Act denies any deduction for such royalties paid in respect of, or for the output of, mines located on private property.

Fourth, the Act permits no deduction either currently or through depletion for any exploration expense incurred for ascertaining the existence, extent, location, or quality of any mineral deposit and paid or incurred prior to the development state of a mine.

Fifth, prior to the 1969 taxable year the Act did not permit through depletion or otherwise the recovery of any development expenses paid or incurred prior to a mine commencing production in Ontario. In 1969, however, section 3(3)(n) was adopted. That section allows a taxpayer to deduct annually 10 percent of the pre-production development costs (but not exploration costs) of a producing mine in Ontario. This deduction is not available, however, to all mining companies, but only to metal mining companies that brought a mine into production after January 1, 1965, and that smelt the ore taken from that mine in Canada. The inability to deduct this significant expense by some mining companies could make the difference between a net gain and a net loss.

In summary, the Act denies or limits the deduction of significant expenses in computing profit from the mining function on treated output under section 3(3)(c), on manufactured output under section 3(3)(b), and on output sold without treatment or manufacture under section 3(3)(a). Accordingly, the tax imposed by section 3(1) of the Act fails to satisfy the second requirement discussed above because it is not almost certain of falling on net gain in the United States sense.

This conclusion is bolstered by the fact that the amount of profit on which the tax is paid in the case of treated output may be artificially inflated or understated by the use of a treatment allowance formula. As previously indicated, this formula is used because the tax imposed by the Act is a tax on the mining function. That is, it is levied only on profit attributable to extraction of output in Ontario (the mining function) as opposed to net profit from the taxpayer's entire operation. Because both a mining and treatment profit may be embodied in the actual receipts from the sale of treated output, to arrive at the market value at the pit's mouth of such output, the Ontario mine assessor deducts, under section 3(3)(c) of the Act, the costs attributable to the treatment function and a profit allowance for treatment. This profit allowance is set at 8 percent of the original cost of the concentrating facilities if output is only concentrated or milled, 16 percent of the original cost of the smelting

facilities if output is concentrated and smelted, and 20 percent of the original cost of the refining facilities if output is concentrated, smelted, and refined. However, the profit allowance for treatment cannot be less than 15 percent or more than 65 percent of the combined profit from the mining and treatment functions.

The use of the set profit allowance may inflate or understate the portion of profit attributable to the mining function. This is because the 65 percent limitation on the amount attributable to treatment assures that at least 35 percent of the gain will be considered as attributable to the mining function. This would be the case even when no portion of gain from treated output was actually attributable to the mining function. Under these circumstances it cannot be said that the tax is almost certain of falling on net gain from the mining function.

Regarding the third requirement of an income tax discussed above, the court in Keasbey held that a Quebec mining tax was a tax upon the mining privilege or an excise tax as opposed to an income tax. The court said that the tax, although designated as a tax on annual profits, is in reality a tax on the mining privilege, measured on the basis of gross value of the output determined under a prescribed formula, less certain deductions, and that the value of the mining output was the basis of the levy independent of either realization of gain or derivation of profits.

Although the tax imposed by the Act is levied upon a base designated as profit, the fact that the tax fails to meet the United States realization and net gain requirements, as heretofore outlined, and the fact that the tax is structured to yield taxable profit from the extraction of output (the mining function) by a formulary shifting of profit derived from treating that output (the treatment function), indicate that such tax is actually a production or severance tax on the mining privilege, such as the Quebec Mining Tax in the Keasbey case. This view is supported by the fact that the Act forbids the mine operator from carrying away from the mine any ore until the weight thereof has been correctly ascertained and entered in the books of account, and the fact that the mine's assessor can enter any mine to take samples for the purpose of determining the value of the ore.

Accordingly, for the above reasons the tax imposed by the Act is not the substantial equivalent of an income tax within the meaning of section 901(b) of the Code.

The final question is whether the tax imposed by section 3(1) of the Act is a tax in lieu of an income tax within the meaning of section 903 of the Code and the regulations thereunder.

Section 1.901-3(a)(3) of the regulations provides, in general, that a credit may be claimed under section 901 of the Code for a section 903 tax if the taxpayer is not subject to the foreign country's general income tax but is subject to a substituted tax. In addition to the tax imposed by the Act, Ontario has in force both corporate and personal income tax laws of general application that are imposed on profits from mining operations. Therefore, because the tax imposed by the Act is imposed in addition to, instead of in substitution for, a general income tax law, the tax imposed by the Act does not satisfy the requirements of section 1.903-1(a) for an in lieu of tax that would be creditable under section 901. Allstate Ins. Co. v. United States, and F. W. Woolworth.

PART I

SECTION 901.--TAXES OF FOREIGN COUNTRIES AND OF POSSESSIONS OF UNITED STATES

26 CFR 1.901-1: Allowance of credit for taxes.
(Also Section 7805; 301.7805-1.)

Rev. Rul. 78-62

The Internal Revenue Service has been asked to reconsider a number of its published revenue rulings and acquiescences relating to the creditability of certain foreign taxes under section 901 of the Internal Revenue Code of 1954. Accordingly, the purpose of the instant Revenue Ruling is to review those prior published positions of the Service and to indicate what the position of the Service is with respect to those prior published revenue rulings and acquiescences.

Whether a foreign tax qualifies as an income tax within the meaning of section 901 of the Code depends on whether that tax constitutes an "income tax" as determined from an examination of the Federal income tax laws of the United States. Biddle v. Commissioner, 302 U.S. 573 (1938), 1938-1 C.B. 309, and Bank of America Nat'l T. & S. Ass'n. v. United States, 459 F.2d 513, 515, 518 (Ct. Cl. 1972), cert. denied, 409 U.S. 949 (1972). Thus, the courts have often said that a foreign tax will be considered to be an income tax within the meaning of section 901 only if that tax is the substantial equivalent of an income tax in the United States sense. See, e.g., Commissioner v. American Metal Co., 221 F.2d 134 (2d Cir. 1955); F. W. Woolworth Co. v. Commissioner, 54 T.C. 1233 (1970), nonacq. on another issue, 1971-2 C.B. 4.

To qualify as an income tax in the United States sense, a foreign tax must satisfy certain requirements. See Rev. Rul. 78-61, 1978-8 I.R.B. . The first requirement relevant to this Revenue Ruling is that the gain on which the foreign tax is levied must be realized in the the United States sense. The United States Federal income tax, a tax of general application, does tax in certain limited situations the constructive or deemed receipt of income. However, as a whole, the Federal income tax is imposed on gain actually realized. Eisner v. Macomber, 252 U.S. 189 (1920), 3 C.B. 25. A substantially equivalent degree of realization is required with respect to foreign taxes. Commissioner v. American Metal Co., 221 F.2d 134 (2d Cir. 1955); Keasbey & Mattison Co. v. Rothensies, 133 F.2d 894, 898 (3d Cir. 1943); and Lanman & Kemp-Barclay & Co. of Colombia, 26 T.C. 582 (1956).

In addition to realization, the second requirement relevant to the instant case is that a foreign tax will not be considered to be an income tax in the United States sense unless its purpose is to reach net gain and it is so structured as to be almost certain of doing so. Bank of America Nat'l T. & S. Ass'n. v. United States; Bank of America Nat'l T. & S. Ass'n. v. Commissioner, 61 T.C. 752 (1974). Generally, a foreign tax is almost certain to fall on net gain if levied on income computed in such a manner that it is very unlikely that taxpayers generally subject to that tax will have to pay it when they have no net gain. See the United States Court of Claims decision in Bank of America Nat'l T. & S. Ass'n. v. United States at 524, wherein it was stated that the ". . . only question is whether it is very unlikely or highly improbable that taxpayers subject to the impost would make no profit or would suffer a loss." See also, Allstate Ins. Co. v. United States, 419 F.2d 409 (Ct. Cl. 1969).

The final requirement relevant to the instant case is that in order for a foreign tax to qualify as an income tax in the United States sense, the tax in question must be imposed on the receipt of income by the taxpayer rather than on transactions such as sales or the exercise of a privilege or a franchise, such as exploiting natural resources. Commissioner v. American Metal Co.; Keasbey & Mattison Co. v. Rothensies; and Rev. Rul. 57-62, 1957-1 C.B. 241.

Herbert Ide Keen v. Commissioner, 15 B.T.A. 1243 (1929), acq., VIII-2 C.B. 27 (1929), involved a French tax imposed solely on the French source income of individuals who maintain a residence in France but are not domiciled there (non-domiciliaries). These non-domiciliaries pay the aforementioned tax on estimated income fixed at a sum equal to seven times the presumed rental value of their respective residences in France, unless their actual French source income exceeds their estimated income. If so, the tax will be computed on their actual income.

The tax paid by non-domiciliaries is separate from the tax paid by individuals who are domiciled in France. The latter pay a tax on their actual income from all sources and not some form of estimated income.

The United States Board of Tax Appeals held this French tax on estimated income to be a creditable income tax principally because it was an income tax under French standards. Relying on the decision in the Keen case, the Board reaffirmed the creditability of that French tax in James R. Hatmaker v. Commissioner, 15. B.T.A. 1044 (1929) (decided for the Commissioner on other grounds). However, subsequent to the Keen and Hatmaker decisions, the Supreme Court of the United States held in the Biddle case that in order for a foreign tax to qualify as a creditable income tax, it must satisfy the United States standard and not the foreign standard of an income tax.

It is apparent that the aforementioned French tax on estimated income does not satisfy any of the United States standards of an income tax discussed above. Such tax is imposed on estimated income fixed at seven times the presumed rental value of a residence even if the non-domiciliary has not realized any gain from French sources or even if such gain as may have been realized is less than such estimated income. Thus, the Service is withdrawing its acquiescence in the Keen case and substituting a nonacquiescence therefor, see 1978-8 I.R.B. . Accord, Commissioner v. American Metal Co., wherein the court stated that Keen is in conflict with the later decision of Biddle. In addition, the Service will not follow the conclusion expressed in the Hatmaker case that the French tax is a creditable income tax.

Also decided prior to the Biddle case was Burk Bros. v. Commissioner, 20 B.T.A. 657 (1930) (decided for the Commissioner on other grounds). In that case the taxpayer, a domestic corporation that manufactured goat skins into leather, purchased some goat skins in India through its Indian office. As a result, India levied a tax on the income deemed to be derived by the taxpayer from the goat skins. This income was determined by multiplying the number of goat skins purchased by the difference between the average sales price of goat skins in Philadelphia and their average sales price in Calcutta. The resulting figure was reduced by certain transportation and skin preservation expenses. The Board of Tax Appeals held the Indian tax to be creditable. However, because the tax in Burk Bros. was triggered by a purchase and was levied without reference to the amount of income, if any, actually realized by the taxpayer during the year, it does not satisfy the first and third requirements of an income tax discussed above. Accordingly, the Service will not follow the holding in the Burk Bros. decision that the Indian tax is a creditable income tax.

Rev. Rul. 272, 1953-2 C.B. 56, involved a Haitian tax imposed at progressive rates under chapters III, IV, and V of the Haitian statute. Chapter III taxed the business income of associations, companies, corporations, except stock companies, individual or partnership enterprises, manufacturers, merchants and professional people. Income for purposes of chapter III was computed on a fixed-rate basis by multiplying by five the yearly rental value of the buildings and land occupied by the aforementioned taxpayers.

Chapter IV of the Haitian statute taxed the net profit of all partnership or individual enterprises, companies, and stock corporations conducting a business. For purposes of chapter IV, net profit was actual receipts less the ordinary and necessary expenses incurred in producing these receipts. Taxpayers who were subject both to the tax on net profits under chapter IV and the tax on income computed on a fixed-rate basis under chapter III were required to pay the net profits tax only on that portion of the net profit, if any, which exceeded the income computed on a fixed-rate basis under chapter III. Moreover, even if a taxpayer with this dual liability had no net profit, it still had to pay a tax on income computed on a fixed-rate basis.

Relying on the decision in the Keen case, Rev. Rul. 272 held that the tax imposed by chapter III on income computed on a fixed-rate basis qualified as a creditable income tax. The Revenue Ruling also concluded that the tax imposed by chapter IV was a creditable income tax. The tax imposed by chapter III is not triggered by a realization event in the United States sense and is levied on a base that is not computed from actual receipts. Therefore, the chapter III tax fails to qualify as a creditable income tax. Moreover, insofar as the chapter IV tax is concerned, the only creditable portion of such tax is that portion that exceeds the tax imposed under chapter III. Accordingly, Rev. Rul. 272 is modified to eliminate the holding thereof that the tax imposed by chapter III of the Haitian tax is a creditable tax and to provide that a taxpayer may treat as a creditable income tax only that portion of the chapter IV tax that exceeds the taxpayer's tax under chapter III. However, the holding in Rev. Rul. 272 that the tax imposed by chapter V of the Haitian statute is creditable is reaffirmed because it is the substantial equivalent of an income tax in the United States sense.

Rev. Rul. 59-192, 1959-1 C.B. 191, and Rev. Rul. 56-658, 1956-2 C.B. 501, dealt with certain Cuban Taxes on unrealized net income expected to be derived by sugar mill owners from processed sugar. The event that triggered the imposition of the taxes was the manufacture of the sugar and not its subsequent sale. Moreover, the net income of the sugar mill owners was computed by multiplying the amount of sugar produced in the mill by the average market price of sugar produced in the mills for the past three years and then reducing this figure by an arbitrary 60 percent figure to cover processing costs. Because the Cuban taxes in Rev. Rul. 59-192 and Rev. Rul. 56-658 were imposed independently of any realized gain, they do not satisfy the United States realization standard. Moreover, if a sugar mill subject to the Cuban taxes had a loss for any year by United States standards, it would still pay the tax because net income by Cuban standards is 40 percent of the average market price of sugar produced by the mill for the past three years. Therefore, the taxes fail to meet the second United States standard that the foreign tax must be almost certain of falling on net gain. For these reasons the Cuban taxes are not creditable income taxes. Accordingly, Rev. Rul. 59-192 and Rev. Rul. 56-658 are revoked.

In Santa Eulalia Mining Co. v. Commissioner, 2 T.C. 241 (1943), acq. 1946-1 C.B. 4, the United States Tax Court held that a Mexican tax of 10 percent imposed by Articles 26(I) and 27, Chapter IV, Third Schedule, of the "Ley del Impuesto sobre la Renta" is a creditable income tax under a predecessor of section 901 of the Code. The "Ley del Impuesto sobre la Renta" (Law) imposed a series of schedular taxes on various classes of taxpayers. The First Schedule of the Law imposed a tax on taxpayers engaged in commerce, industry, and agriculture and thus would include taxpayers actively engaged in the conduct of a mining business in Mexico.

Article 26(I) of the Third Schedule of the Law imposed a modified gross income tax on "(t)axpayers who . . . receive participations, whether in the form of rentals or otherwise, from the exploitation of the subsoil or concessions granted by the Federal or state Governments or Municipalities." The amount of participations subject to tax are the gross amount received, less a limited number of deductions as set forth in regulations issued under Article 27. However, persons who are actively engaged in the mining business in Mexico, " . . . taxpayers whose income consists of a participation in the profits of the exploiting concern. . . ," are specifically excluded from Article 26(I) of the Third Schedule of the Law because they pay tax under the First Schedule of the Law. Thus, only taxpayers not engaged in the conduct of a mining business in Mexico who receive participations are subject to the tax imposed by Article 26(I).

Though the tax imposed by Article 26(I) falls on the gross amount of participations received by the above taxpayers as reduced by a limited number of deductions, the tax does not violate the third requirement of an income tax discussed above. Because the above taxpayers are not engaged in the conduct of a mining business in Mexico, it is presumed that the expenses ordinarily connected with such participations and incurred by such taxpayers will almost never exceed the income from such participations. Therefore, the foreign tax imposed on such participations as reduced by the aforementioned deductions will be almost certain of reaching net gain. Bank of America Nat'l T. & S. Ass'n v. United States, and Rev. Rul. 73-106, 1973-1 C.B. 343, holding a Mexican tax imposed on the gross amount of royalties received by nonresident aliens and foreign legal entities not established in Mexico to be a creditable income tax. Additionally, similar taxes have long been imposed by the United States on dividends, interest, and

royalties paid to nonresident aliens and foreign corporations (that are not effectively connected with the conduct of a trade or business in the United States) as a basic part of the United States income tax system. See sections 871(a)(1)(A) and 881(a)(1) of the Code. The thrust of these United States tax provisions is realistically directed against net gain or profit. See Bank of American Nat'l T. S. Ass'n. v. Commissioner, 61 T.C. 752 (1974).

Accordingly, because the tax imposed by Article 26(I) and 27 of the Third Schedule of the Law is the substantial equivalent of an income tax in the United States sense, the Service reaffirms its acquiescence in the decision in Santa Eulalia Mining Company.

Pursuant to the authority contained in section 7805(b) of the Code, this Revenue Ruling will not be applied to taxable years beginning before January 16, 1978, with respect to taxpayers who have relied on Rev. Rul. 59-192, Rev. Rul. 56-658, and Rev. Rul. 272, but only insofar as the specific taxes discussed in those Revenue Rulings are concerned.

Rev. Rul. 272 is modified. Rev. Rul. 59-192 and Rev. Rul. 56-658 are revoked.

PART I

SECTION 901.--TAXES OF FOREIGN COUNTRIES AND OF POSSESSIONS OF UNITED STATES

26 CFR 1.901-1: Allowance of credit for taxes.
(Also Sections 903, 7805; 1.903-1, 301.7805-1.)

Rev. Rul. 78-63

The purpose of this Revenue Ruling is to reconsider Rev. Rul. 68-552, 1968-2 C.B. 306, and Rev. Rul. 55-296, 1955-1 C.B. 386. Rev. Rul. 68-552 held the "surtax" paid to Libya under Article 14(1)(a) of Libyan Petroleum Law No. 25 of 1955, as amended through Nov. 20, 1965, to be a creditable income tax under section 901 of the Internal Revenue Code of 1954. Rev. Rul. 55-296 held that amounts received by Saudi Arabia under Royal Decree No. 17/2/28/3321, dated November 4, 1950, and under Royal Decree No. 17/2/28/7634, dated December 27, 1950 are creditable income taxes.

Rev. Rul. 68-552

Article 1(1) of Libyan Petroleum Law No. 25 of 1955, as amended through January 1, 1975 (hereinafter "Petroleum Law") provides that all underground oil and gas in Libya is the property of the Libyan government.

Article 1(2) of the Petroleum Law provides, in part, that no person shall mine or produce petroleum unless authorized by a concession issued under that Law.

Article 14(1) of the Petroleum Law and Clause 8(1) of the Second Schedule (Standard Form Deed of Concession) to that Law, specify that an oil company or other concession holder under the Petroleum Law shall pay such income tax and other taxes and imposts as are payable under the laws of Libya.

All companies engaged in business in Libya must pay a company income tax. See Articles 1 and 93-104 of Part II of Law No. 64 of 1973, effective Oct. 1, 1973, as amended through December 1975 (hereinafter "Company Tax"). Prior to the effective date of this law such companies were subject to a company income tax substantially similar to the above law. See, Articles 1 and 89-99 of Income Tax Law No. 21 of 1968.

In addition, Article 14(1)(a) of the Petroleum Law, and Clause 8(1)(a) of the Second Schedule to the Petroleum Law, require that if the total annual amount of fees, rents, income tax, and other direct taxes except royalties equal to 16.67 percent of the value of crude oil exported, paid or payable by a petroleum concession holder to Libya, falls short of 65 percent of its profits from all its Libyan petroleum concessions, such concession holder must pay Libya such sum by way of "surtax" as will make the total of its payments equal 65 percent of its profits. Thus, this provision guarantees Libya at least a 65 percent share of each concessionaire's profits.

"Profits" are defined as the income resulting from the operations of the concession holder in Libya after deducting (1) operating expenses and overhead, (2) depreciation of all physical assets in Libya, (3) amortization for all other capital expenditures in Libya, (4) exploration and prospecting expenses, (5) intangible drilling costs, and (6) royalties not mentioned in Article 14(1)(a) of the Petroleum Law. Article 14(2), (3), and (4) of the Petroleum Law, and Clause 8(2), (3), and (4) of the Second Schedule to that Law. No deduction is allowed for interest or expenses incurred in organizing and initiating petroleum operations in Libya prior to receiving a concession from the government and for fees, rents, income tax, and other direct taxes mentioned in Article 14(1)(a).

Article 14(5)(a) and (b) of the Petroleum Law, and Clause 5(a) and (b) of the Second Schedule to that Law, further define "income resulting from the operations of the concession holder in Libya" as follows:

(a) In relation to crude oil exported by the concession holder from Libya: total gross receipts realized by the concession holder from such export, and such receipts shall not be less than the amount which results from multiplying the number of barrels of such crude oil exported by the applicable posted price per barrel of such crude oil less [certain marketing allowances as discussed below] . . . .

(b) In relation to other operations of the concession holder in Libya the income to be ascertained in a manner to be agreed between the concession holder and the Ministry of Petroleum.

The value of petroleum and natural gasoline taken as a royalty in kind under Article 13 of the Petroleum Law shall be deemed to form part of such income. [Emphasis added.]

The term "posted price" is defined as

> . . . the price f.o.b. Seaboard Terminal for Libyan crude oil of the gravity and quality concerned arrived at by reference to free market prices for individual commercial sales of full cargoes and in accordance with the procedure to be agreed between the concession holder and the Ministry of Petroleum or if there is no free market for commercial sales of full cargoes of Libyan Crude Oil, then posted price shall mean a fair price fixed by agreement between the concession holder and the Ministry of Petroleum. . . . [Article 14(5) of the Petroleum Law.]

Prior to 1965, Libya permitted oil companies to reduce the posted price by certain marketing discounts in computing their "surtax" under Article 14(1)(a) of the Petroleum Law. See Article 15 of Petroleum Reg. No. 6, dated December 21, 1961. The resulting net price figure was approximately equal to the actual price that an unrelated purchaser would ordinarily pay for a barrel of Libyan crude oil (hereinafter "market price"). However, in 1965, Libya began to eliminate these discounts, thereby assuring that the "surtax" would be computed on the basis of posted prices set in excess of actual market price. See, Clause 8(5)(a) of the Second Schedule to the Petroleum Law. Thereafter, Libya exercised increasing control over the level of posted prices and subsequently assumed total responsibility for fixing those prices. The posted price is an arbitrary value placed on a barrel of crude oil for the purpose of computing a foreign oil concessionaire's tax under Article 14(1)(a) of the Petroleum Law.

Except for some differences not here relevant, the "surtax" imposed by Article 14(1)(a) of Libyan Petroleum Law is essentially identical to the "surtax" imposed by Article 14(1)(a) of Libyan Petroleum Law No. 25 of 1955, as amended through Nov. 20, 1965.

Some foreign oil concessionaires sell Libyan oil directly to unrelated parties at the market price even though under either version of the Petroleum Law they are required to pay the above "tax" on a base measured from the posted price. Others sell the oil to purchasing affiliates at the posted price. These affiliates then resell the oil at the market price and regularly suffer losses equal to the difference between the posted and market price.

Foreign oil concessionaires must also pay Libya a per barrel royalty currently fixed at 16.67 percent of the value of crude oil exported as determined from the posted price.

Subject to certain limitations, section 901 of the Code permits domestic corporations to claim a credit for income taxes paid or accrued to foreign countries.

Whether a payment made to a foreign government qualifies as an income tax under section 901 of the Code depends on whether it is the substantial equivalent of an "income tax" as determined from an examination of the Federal income tax laws of the United States. E.g., Biddle v. Commissioner, 302 U.S. 573, 578 (1938), 1938-1 C.B. 309, and Bank of America Nat'l T. & S. Ass'n v. United States, 459 F.2d 513 518 (Ct. Cl. 1972), cert. denied, 409 U.S. 949 (1972).

To qualify as an income tax in the United States sense, amounts received by a foreign government must satisfy certain requirements. See generally, Rev. Rul. 78-61 , 1978-8 I.R.B. . Among these requirements, the amounts must constitute a tax that is paid or accrued. The tax must be based upon gain or profit realized by the taxpayer. The tax must be structured to be almost certain of falling on net gain.

An income tax in the United States sense is not one that is intentionally structured to tax artificial or fictitious income. F. W. Woolworth v. Commissioner, 54 T.C. 1233 (1970), nonacq. on another issue, 1971-2 C.B. 4. The Woolworth case considered the creditability of Schedule A of the British Income Tax Act of 1952. Under that schedule a tax was levied on the rent derived from real property. However, if the property was owner-occupied or otherwise not rented, the tax fell not on actual income but on a fictitious amount, the imputed rental value of the property. The court denied credit for the tax stating that:

> [t]he United States concept of "income" is based upon gain or profit realized by the taxpayer (i.e., net income as opposed to gross income, gross sales, or some other basis). . . By no stretch of the imagination could it be said that the tax under Schedule A on the ownership of property as measured by its annual rental value, which may be an estimated figure, falls within the scope of this concept. F. W. Woolworth Co. v. Commissioner, at 1260. [Emphasis added.]

As previously stated, the income subject to the "surtax" is defined under Article 14(5) of the Libyan Petroleum Law, and Clause 5(a) of the Second Schedule to that Law, as total gross receipts with the further requirement that such receipts shall not be less than the number of barrels exported multiplied by the posted price less marketing allowances. Because the "surtax" imposed by Article 14(1)(A) of the Libyan Petroleum Law is levied on a base measured from an arbitrarily determined value (the posted price), the base on which the "surtax" is levied is artificial or fictitious. For example, when a concessionaire sells Libyan oil directly to unrelated parties at the market price, the concessionaire must pay the "surtax" on a base measured from the posted price even though the sales proceeds are less than the posted price. The Libyan "tax" base is not made any less fictitious or artificial by the fact that (1) some concessionaires actually sell the Libyan oil to their affiliates at the posted price, and (2) the affiliates then dispose of the oil at the lower market price, claiming losses equal to the difference. Although the purchasing affiliate makes a payment equal to the posted price in this situation, it does so only because it is required to do so by the persons who control both it and the concessionaire.

Gain on which the foreign tax is levied must be realized in the United States sense. Since the income subject to the "surtax" cannot be less than the number of barrels exported multiplied by the posted price less marketing allowances, the "surtax" may be triggered by the export of crude oil regardless of whether a sale has taken place. Thus, the requirement that the tax be imposed on realized income is not satisfied. See, Motland v. Commissioner, 192 F. Supp. 358, 361 (N.D. Iowa 1961), denying a credit for a Cuban tax triggered by the export of capital, and Keasbey & Mattison Co. v. Rothensies, 133 F.2d 894, 895, n. 1 and 898 (3rd Cir. 1943).

In Keasbey, the court denied a credit for the Quebec Mining Tax which was imposed on the gross value of mineral output, less allowable deductions, and which was triggered by shipment, use, or sale of that output. Gross value was computed from the ruling market prices of the minerals whether or not sold and, if sold, without regard to whether the sales proceeds were greater or lesser than the ruling market prices.

For these reasons, the "surtax" imposed by Article 14(1)(a) of the Libyan Petroleum Law is not the substantial equivalent of an income tax in the United States sense as required by section 901 of the Code. F. W. Woolworth; Motland; Keasbey.

The next question is whether the "surtax" is a tax in lieu of an income tax within the meaning of section 903 of the Code.

Section 903 of the Code provides, in part, that income taxes as used in section 901 shall include a tax paid in lieu of a tax on income otherwise generally imposed.

Section 1.903-1(a) of the Income Tax Regulations provides, in part, that the term "income tax" includes a tax imposed by statute or decree by a foreign country or by a possession of the United States if (1) such country or possession has in force a general income tax law, (2) the taxpayer claiming the credit would, in the absence of a specific provision applicable to such taxpayer, be subject to such general income tax, and (3) such general income tax is not imposed upon the taxpayer thus subject to such substituted tax.

An oil concessionaire is subject to both the Company Tax and the "surtax" with respect to the profits it derives from its operations in Libya. Thus, the "surtax" cannot qualify as a tax imposed in lieu of the Company Tax within the meaning of section 903 of the Code. See, sections 1.903-1(a)(2) and (3) of the regulations; Allstate Ins. Co. v. United States, 419 F.2d 409 (Ct. Cl. 1969); Rev. Rul. 58-3, 1958-1 C.B. 263.

Accordingly, the "surtax" imposed by Article 14(1)(a) of the Libyan Petroleum Law is neither an income tax in the United States sense nor a tax in lieu of an income tax. Therefore, it is not creditable under section 901 of the Code.

Rev. Rul. 68-552 is revoked. Pursuant to the authority contained in section 7805(b) of the Code this Revenue Ruling will be applied only to amounts paid or accured to Libya for taxable years beginning on or after July 1, 1978, provided the taxpayer does not change the taxpayer's accounting period.

Rev. Rul. 55-296

Chapter I of Royal Decree No. 17/2/28/3321, dated November 4, 1950, as amended through September 2, 1970 (the November Decree), levies a tax at progressive rates on the combined Saudi source "personal income" and "income earned by investment of capitals," derived by individuals. Articles 1, 2, 3, 4, and 6 of the November Decree. Chapter I of the November Decree has been cancelled with respect to income earned by individuals after May 14, 1975.

Chapter II of the November Decree levies a tax at progressive rates currently set as high as 45 percent on the Saudi source "net profits" derived by all companies engaged in business in Saudi Arabia whose capital is non-Saudi (foreign companies). Article 11 of the November Decree.

In addition, under Royal Decree No. 17/2/28/7634, dated December 27, 1950, as amended through November 27, 1974 (the December Decree), foreign companies engaged in the production of oil and gas in Saudi Arabia and owned in whole or in part by non-Saudis (foreign oil companies) must also pay a so-called "additional income tax" on their "net operating income."

Articles 1 and 3 of the December Decree provide that if the total amount of duties, rents, income tax, Chapter II tax, other direct taxes, and that amount of royalties which exceeds 20 percent of the value of crude oil produced and sold for export does not equal 85 percent of an oil company's net operating income, then such company must pay Saudi Arabia "additional income tax" sufficient to make its total payments equal 85 percent of its net operting income. Thus, the December Decree assures that Saudi Arabia will receive at a minimum 85 percent of a foreign oil company's net operating income.

Except for differences not here relevant, the statutory provisions of both Chapter II of the November Decree and the December Decree are essentially identical to the statutory provisions of the December Decree, and Chapter II of the November Decree, respectively, in effect when Rev. Rul. 55-296 was issued.

No United States company engaged in producing oil and gas in Saudi Arabia computes the levies imposed, respectively, by the December Decree and by Chapter II of the November Decree exactly as provided by the above decrees. Instead, both the December Decree and Chapter II of the November Decree, as they apply to such companies, have been modified by individual agreements and understandings between each of the companies and the Saudi Government and, since 1973, by directives issued to each of the oil companies by that Government. It is understood that these agreements are not contractual agreements in the ordinary sense, but rather are imposed upon the oil companies by the Saudi Government.

Under the individual agreements and understandings discussed above, United States oil companies engaged in producing oil and gas in Saudi Arabia pay "Chapter II tax" calculated at a flat 20 percent rate. By contrast, companies engaged in other business activities in Saudi Arabia are required to pay such tax at progressive rates as high as 45 percent.

Also, a United States company engaged in producing oil and gas in Saudi Arabia is required by the above agreements and understandings to sell in Saudi Arabia all oil destined for export. Additionally, for the purposes of such sales and for the computation of "net profits" under Chapter II of the November Decree, and thus "net operating income" under the December Decree, the oil companies have been required, at least up until 1977, to use a posted price established by the Saudi Government. Posted price is a fixed price generally in excess of the actual price (market price) that an unrelated purchaser would ordinarily pay such companies for a barrel of Saudi crude oil.

Posted price is an arbitrary value placed on a barrel of crude oil which has been used for the purpose of computing a foreign oil company's "income tax" under Chapter II of the November Decree and its "additional income tax" under the December Decree, each as modified by the aforementioned agreements, understandings, and directives.

Foreign oil companies must also pay Saudi Arabia a per barrel royalty currently fixed at 20 percent of the posted price.

Neither the "income tax" nor the "additional income tax" imposed, respectively, on foreign oil companies by Chapter II of the November Decree, and by the December Decree, each as modified by the aforementioned agreements, understandings, and directives, has been imposed upon income in the United States sense. As is stated above, an income tax in the United States sense is not one that is intentionally structured to tax artificial or fictitious income. Accordingly, these Saudi "taxes" are not substantial equivalents of income taxes in the United States sense as required by section 901 of the Code.

The next question is whether amounts received by Saudi Arabia from foreign oil companies under Chapter II of the November Decree, as modified, and under the December Decree, as modified, respectively, are taxes in lieu of income taxes within the meaning of section 903 of the Code.

Saudi Arabia has no generally imposed income tax. Instead, it imposes a series of separate taxes restricted to limited classes of taxpayers. Companies wholly owned by Saudis are required to pay the Islamic religious tax known as the Zakat. Article 2 of Royal Decree No. 17/2/28/8634, dated April 24, 1951, as implemented by Royal Decree No. 17/2/28/8799, dated June 15, 1951. Only foreign companies engaged in activities in Saudi Arabia other than the production of oil and gas are required to pay the income tax imposed by Chapter II of the November Decree. Only foreign companies engaged in the production of Saudi oil and gas are required to pay the "taxes" imposed, respectively, by Chapter II of the November Decree, as modified, and the December Decree, as modified.

Since there is no generally imposed Saudi income tax in the United States sense for which the "taxes" on foreign oil companies imposed, respectively, by Chapter II of the November Decree, as modified, and the December Decree, as modified, are substitutes, such "taxes" cannot qualify as in lieu of "taxes" within the meaning of section 903 of the Code.

Accordingly, the levies imposed on oil companies by Chapter II of the November Decree, as modified, and by the December Decree, as modified, respectively, have been neither income taxes in the United States sense nor taxes in lieu of such income taxes in the United States sense.

Rev. Rul. 55-296 is revoked. However, pursuant to the authority contained in section 7805(b) of the Code, this Revenue Ruling will be applied only to amounts paid or accrued to Saudi Arabia for taxable years beginning on or after July 1, 1978, provided the taxpayer does not change the taxpayer's accounting period.

The holdings of this Revenue Ruling with respect to section 901 of the Code are limited to the questions discussed herein and no opinion is expressed as to whether the amounts received by Libya and Saudi Arabia might fail to qualify as creditable income taxes for any other reasons.

Rev. Rul. 68-552 is revoked. Rev. Rul. 55-296 is revoked.